SUPREME COURT
OF THE UNITED STATES

No. 12-10
Title: Agency for International Development, et al., Petitioners
v.
Alliance for Open Society International, Inc., et al.
Docketed: July 3, 2012
Linked with 11A999
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (08-4917)
Decision Date: July 6, 2011
Rehearing Denied: February 2, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 20 2012	Application (11A999) to extend the time to file a petition for a writ of certiorari from May 2, 2012 to July 1, 2012, submitted to Justice Ginsburg.
Apr 20 2012	Application (11A999) granted by Justice Ginsburg extending the time to file until July 2, 2012.
Jul 2 2012	Petition for a writ of certiorari filed. (Response due August 2, 2012)
Jul 2 2012	Appendix of Agency for International Development, et al. filed.
Jul 19 2012	Order extending time to file response to petition to and including September 4, 2012.
Aug 13 2012	Order further extending time to file response to petition to and including October 4, 2012.
Sep 21 2012	Order further extending time to file response to petition to and including November 5, 2012.
Nov 5 2012	Order further extending time to file response to petition to and including December 5, 2012.
Dec 3 2012	Order further extending time to file response to petition to and including December 12, 2012.
Dec 12 2012	Brief of respondents Alliance for Open Society International, Inc., et al. in opposition filed.
Dec 26 2012	DISTRIBUTED for Conference of January 11, 2013.
Jan 11 2013	Petition GRANTED. Justice Kagan took no part in the consideration or decision of this petition.
Feb 11 2013	SET FOR ARGUMENT ON Monday, April 22, 2013
Feb 25 2013	Brief of petitioners Agency for International Development, et al. filed.
Feb 25 2013	Joint appendix filed. (Statement of costs filed.)

Feb 27 2013	Record Received from the U.S.D.C. Southern District of New York. (1-Box)
Mar 1 2013	CIRCULATED.
Mar 4 2013	Brief amicus curiae of American Center for Law and Justice filed. (Distributed)
Mar 4 2013	Brief amicus curiae of Coalition Against Trafficking in Women filed. (Distributed)
Mar 19 2013	Record from U.S.C.A. for 2nd Circuit is electronic.
Mar 27 2013	Brief of respondents Alliance for Open Society International, Inc., et al. filed. (Distributed)
Apr 1 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Apr 2 2013	Brief amici curiae of American Civil Liberties Union, et al. filed.
Apr 3 2013	Brief amicus curiae of Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS Secretariat) filed. (Distributed)
Apr 3 2013	Brief amicus curiae of Heartbeat International, Inc. filed. (Distributed)
Apr 3 2013	Brief amici curiae of Deans and professors of public health and organizations working in public health policy and implementation filed. (Distributed)
Apr 3 2013	Brief amici curiae of Becket Fund for Religious Liberty and the Christian Legal Society filed. (Distributed)
Apr 3 2013	Brief amicus curiae of Independent Sector filed. (Distributed)
Apr 3 2013	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Apr 3 2013	Brief amicus curiae of Current and Former Members of Congress filed. (Distributed)
Apr 3 2013	Brief amicus curiae of Cato Institute filed.
Apr 3 2013	Brief amicus curiae of Thomas Jefferson Center for the Protection of Free Expression filed.
Apr 15 2013	Reply of petitioners Agency for International Development, et al. filed. (Distributed)
Apr 22 2013	Argued. For petitioners: Sri Srinivasan, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondents: David W. Bowker, Washington, D. C.

12-10

No.

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. 7631(f), which requires an organization to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are the United States Agency for International Development; Rajiv Shah, Administrator of the United States Agency for International Development; the United States Department of Health and Human Services; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; the United States Centers for Disease Control and Prevention; and Thomas R. Frieden, the Director of the United States Centers for Disease Control and Prevention.

Respondents are Alliance for Open Society International, Inc., Pathfinder International, Global Health Council, and InterAction.

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No.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Agency for International Development, the United States Department of Health and Human Services, the United States Centers for Disease Control and Prevention, and officials of those agencies, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-96a) is reported at 651 F.3d 218. The order of the court of appeals denying rehearing en banc over the dissent of three judges (App., *infra*, 97a-111a) is reported at 678 F.3d 127. The relevant orders of the district court

(App., *infra*, 112a-252a) are reported at 430 F. Supp. 2d 222 and 570 F. Supp. 2d 533.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on February 2, 2012 (App., *infra*, 98a). On April 20, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 2, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." Relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 253a-336a.

STATEMENT

1. a. This case presents a constitutional challenge to the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 22 U.S.C. 7601 *et seq.* That Act responded to Congress's finding that the global spread of HIV/AIDS had infected more than 65 million people worldwide, killing 25 million and leaving more than 14 million orphaned children. See 22 U.S.C. 7601(2). Congress found that the spread of HIV/AIDS had assumed "pandemic proportions, * * * leaving an unprecedented path of death and devastation." 22 U.S.C. 7601(1). As of 2003, HIV/AIDS was the fourth-highest cause of death across the globe, and the President termed addressing it "one

of the most urgent needs of the modern world." Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 39 Weekly Comp. Pres. Docs. 663, 664 (May 27, 2003).

The Leadership Act is the primary component of the United States' effort to fight HIV/AIDS abroad. Under that Act, Congress has authorized the appropriation of billions of dollars for the President to establish "a comprehensive, integrated, [five]-year strategy to expand and improve efforts to combat global HIV/AIDS." 22 U.S.C. 7611(a) (2006 & Supp. IV 2010).[1] That comprehensive strategy must be designed to attack HIV/AIDS in multiple ways. Among other things, the strategy must include plans for providing care to those infected with HIV/AIDS; preventing further transmission of HIV infections, particularly among "families with children (including the prevention of mother-to-child transmission), women, young people, orphans and vulnerable children"; expanding efforts with other public and private entities to improve HIV/AIDS prevention and treatment programs; and accelerating research on prevention methods. 22 U.S.C. 7611(a)(4), (5), (7), (9), (10) and (25) (2006 & Supp. IV 2010); see 22 U.S.C. 7603 (describing Congress's goals in the Leadership Act).

b. As part of the Act's multi-pronged approach to fighting HIV/AIDS, Congress paid close attention to the underlying social conditions that foster its spread. For instance, Congress found that "[w]omen are four times more vulnerable to infection than are men and are be-

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[1] Congress authorized $15 billion for the effort to combat HIV/AIDS, malaria, and tuberculosis for the period from 2004 to 2008, see 22 U.S.C. 7671(a) (2006), and it has since authorized an additional $48 billion for the period from 2008 to 2013, see 22 U.S.C. 7671(a) (2010).

coming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS." 22 U.S.C. 7601(3)(B). Congress noted that "[w]omen and children who are refugees or are internally displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection." 22 U.S.C. 7601(3)(C); see 22 U.S.C. 7601(3)(A) ("At the end of 2002, * * * more than 3,200,000 [of those individuals infected with HIV/AIDS worldwide] were children under the age of 15 and more than 19,200,000 were women.").

To prevent the transmission of HIV/AIDS among those high-risk groups, Congress addressed the conditions and behaviors that were responsible for placing them at risk. See 22 U.S.C. 2151b-2(d)(1)(A) (2006 & Supp. IV 2010) (directing that HIV/AIDS funding be used to "help[] individuals avoid behaviors that place them at risk of HIV infection"). Specifically, the Leadership Act "make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts," including by promoting abstinence and monogamy, encouraging the proper use of condoms, and supporting drug prevention and treatment programs. 22 U.S.C. 7611(a)(12)(A), (B) and (E) (2006 & Supp. IV 2010). As especially relevant here, the Act requires "educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of

women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (2006 & Supp. IV 2010).[2]

As part of its emphasis on addressing behaviors that create a particular risk of HIV infection, Congress made a considered decision to pursue the reduction of prostitution and sex trafficking, particularly in developing countries where most of the federally-funded programs at issue are provided. In enacting the Leadership Act, Congress found that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). In Cambodia, for example, "as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia." *Ibid.* Among female prostitutes in certain areas of Thailand and India, the rates of HIV/AIDS infection were even higher. See *Trafficking in Women & Children in East Asia & Beyond: A Review of U.S. Policy, Hearing Before Subcomm. on East Asian & Pacific Affairs of Sen. Comm. on Foreign Relations*, 108th Cong., 1st Sess. 18 (2003) (statement of Sen. Brownback, Chairman, Subcomm. on East Asian and Pacific Affairs). Moreover, prostitution fuels the demand for interna-

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[2] In prioritizing the reduction of behavioral risks for HIV/AIDS, Congress invoked the success of the HIV/AIDS programs implemented by Uganda between 1991 and 2000. See 22 U.S.C. 7601(20). Uganda had urged citizens to abstain from premarital sex, to be faithful to sexual partners, and to use condoms. See 22 U.S.C. 7601(20)(C). Congress directed that similar messages be promoted to combat HIV/AIDS worldwide. See 22 U.S.C. 2151b-2(d)(1)(A), 7611(a)(12) (2006 & Supp. IV 2010).

tional sex trafficking of women and children. See *id.* at 18-19.[3]

2. Pursuant to the Leadership Act, the United States has provided billions of dollars to nongovernmental organizations so that they can assist in the fight against the HIV/AIDS epidemic overseas. See 22 U.S.C. 2151b-2(c), 7671 (2006 & Supp. IV 2010). In order to ensure that those funds are spent consistently with the Act's objectives, Congress has placed two limitations on the use of those funds. First, 22 U.S.C. 7631(e) provides that no funds made available under the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." Second, 22 U.S.C. 7631(f)—the provision at issue in this case—provides that no funds made available under the Act "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." That statutory restriction does not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; or to any United Nations agency. See *ibid.*

The Department of Health and Human Services (HHS) and the United States Agency for International

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[3] In enacting the Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. 7101, Congress sought to eliminate the global criminal trade in persons, in which 700,000 individuals are trafficked each year into forced prostitution and other forms of modern-day slavery. See 22 U.S.C. 7101(a), (b)(1)-(3) and (8). Like the Leadership Act, the TVPA (as amended in 2003) prohibits the use of federal funding "to promote, support, or advocate the legalization or practice of prostitution," and further provides that federal funding to rescue and assist the victims of severe forms of trafficking will be provided only to organizations that state that they do not "promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C. 7110(g)(1)-(2).

Development (USAID) are the federal agencies primarily responsible for funding programs and services under the Leadership Act. They have implemented Section 7631(f)'s funding eligibility condition in similar ways. HHS has promulgated a regulation that, in its current form, requires the recipient of any grant, cooperative agreement, or other funding arrangement to agree in the award document that the recipient is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. 89.1. Likewise, USAID has issued an Acquisition & Assistance Policy Directive that requires the recipient of any contract, grant, or cooperative agreement under the Leadership Act to agree in the award document that the recipient is opposed to prostitution and sex trafficking because of the psychological and physical harms they cause to women, men, and children. See App., *infra*, 299a-336a.

3. Respondents Alliance for Open Society International, Inc. (AOSI) and Pathfinder International (Pathfinder) are nongovernmental organizations that receive funding for overseas HIV/AIDS prevention programs under the Leadership Act. In 2005, they brought suit against HHS, USAID, and other federal agencies and officials, alleging that Section 7631(f) violates the First Amendment by conditioning their receipt of Leadership Act funds on the affirmative adoption of a policy opposing prostitution. In 2006, the district court granted respondents AOSI and Pathfinder preliminary injunctive relief. App., *infra*, 112a-219a. Applying heightened scrutiny, *id.* at 164a, 196a, the court held that Section 7631(f) is not narrowly tailored to Congress's interest in eradicating prostitution as part of its strategy to combat HIV/AIDS, imposes a viewpoint-based restriction on

respondents' use of funds, and impermissibly compels private speech. *Id.* at 198a-214a.

While the government's appeal of that decision was pending, HHS and USAID developed guidelines that allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). Those guidelines permit an organization to remain eligible for funding and yet be affiliated with a group that "engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," so long as the organization that receives funding has "objective integrity and independence from any affiliated organization." 45 C.F.R. 89.3; see App., *infra*, 297a, 309a. Whether a recipient is independent from affiliated organizations depends on the totality of the circumstances, including such factors as whether the groups are legally distinct and maintain separate personnel, records, facilities, and forms of identification. See 45 C.F.R. 89.3(b); App., *infra*, 298a, 309a-310a.

In light of the new guidelines, the court of appeals remanded for the district court to determine whether preliminary injunctive relief continued to be appropriate. App., *infra*, 224a. On remand, the district court held that the newly-issued guidelines did not affect its previous decision. *Id.* at 241a-250a. The district court also extended injunctive relief to two new plaintiffs named in an amended complaint, respondents Global Health Council (GHC) and InterAction, which are associations of nongovernmental organizations that collectively include most of the groups based in the United States that receive funding under the Leadership Act. *Id.* at 251a-252a. The government again appealed, and while that second appeal was pending, HHS and USAID

promulgated further guidance that allows funding recipients additional flexibility in partnering with affiliates not subject to Section 7631(f).

4. a. A divided panel of the court of appeals affirmed. App., *infra*, 1a-96a. The court held that Section 7631(f) "likely violates the First Amendment by impermissibly compelling [respondents] to espouse the government's viewpoint on prostitution." *Id.* at 17a. According to the court, Section 7631(f) "falls well beyond * * * permissible funding conditions," because "[it] does not merely restrict recipients from engaging in certain expression * * * but pushes considerably further and mandates that recipients affirmatively *say* something." *Id.* at 25a. The panel also observed that Section 7631(f) is "viewpoint-based, because it requires recipients to take the government's side on a particular issue." *Id.* at 27a. The panel recognized that the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program," but only where "the government's program *is*, in effect, its message." *Id.* at 32a. Here, the panel concluded, the purpose of the Leadership Act is to fight HIV/AIDS, and in its view advocacy against prostitution is not central to that mission. *Id.* at 32a-34a. The panel rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. *Id.* at 35a-36a.

b. Judge Straub dissented on the ground that Section 7631(f) "neither imposes a coercive penalty on protected First Amendment rights nor discriminates in a way aimed at the suppression of any ideas." App., *infra*, 37a. A funding condition "cabined to the federal subsidy

program to which it is attached" has no "coercive force" even if it "limit[s] or affect[s] speech," Judge Straub reasoned, because potential recipients "can simply choose not to accept the funds." *Id.* at 55a-56a. After surveying this Court's decisions addressing conditions on government subsidies, Judge Straub reasoned that those cases allow the government to "insist[] that public funds be spent for the purposes for which they were authorized." *Id.* at 73a (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991)). In Judge Straub's view, Section 7631(f) "does precisely that" because Congress "only authorized federal funds for organizations that shared its desire to affirmatively reduce HIV/AIDS behavioral risks, including its policy of eradicating prostitution." *Id.* at 74a. Finally, Judge Straub observed, the agencies' guidelines leave funding recipients able "to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds." *Id.* at 77a.

5. The court of appeals denied rehearing en banc, over the dissent of three judges and with the concurrence of one other judge. App., *infra*, 97a-111a.

a. Judge Cabranes (joined by Judges Raggi and Livingston) concluded that en banc review was appropriate because "[t]he question presented is indisputably one of exceptional importance," App., *infra*, 98a; "the panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge," *id.* at 103a (citing *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (D.C. Cir. 2007)); and "[t]he decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions," *id.* at 99a. According to Judge Cabranes, "it is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an

affirmative-negative paradigm of the panel's own invention." *Id.* at 103a.

b. Judge Pooler concurred in the denial of rehearing en banc. App., *infra*, 106a-111a. In her view, "[t]he unconstitutional conditions doctrine is messy and unsettled," and she deemed it unsurprising that the panel decision had "created a circuit split." *Id.* at 107a-108a. Judge Pooler suggested that en banc review would have "precious little prospect of resolving any of the current doctrinal disarray," because the en banc court's resolution of the question "simply could not substitute for the Supreme Court's attention." *Id.* at 108a, 110a; cf. *id.* at 100a n.2 (Cabranes, J., dissenting from the denial of rehearing en banc) ("Judge Pooler would prefer the Supreme Court's attention. So be it.") (internal quotation marks omitted).

REASONS FOR GRANTING THE PETITION

Over a three-judge dissent from the denial of rehearing en banc, the Second Circuit enjoined on constitutional grounds a provision in an Act of Congress. That provision imposes a condition on the receipt of billions of dollars in federal aid, to ensure that those funds are spent to combat the HIV/AIDS epidemic in the manner Congress intended. Congress provides those funds to nongovernmental organizations for foreign programs as part of a strategy that seeks not only to treat HIV/AIDS but to reduce the behavioral risks that foster its spread. As part of that strategy, Congress requires funding recipients to "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). It does so to ensure that its partners in the fight against HIV/AIDS further Congress's chosen program and comport with Congress's determination that participating in the sex

trade or sex trafficking carries serious risks for women, men, and children across the globe.

By invalidating that condition on the acceptance of federal funds, the Second Circuit has undermined the government's ability to implement the comprehensive approach chosen by Congress. Two of the respondents are associations of nongovernmental organizations that collectively include most of the groups based in the United States that receive the HIV/AIDS funding at issue. As a consequence, the decision below effectively enjoins the operation of Section 7631(f) with respect to domestic organizations, and further proceedings in the district court cannot alter the Second Circuit's decision holding that provision unconstitutional. The Second Circuit has thus exercised "the grave power of annulling an Act of Congress," *United States* v. *Gainey*, 380 U.S. 63, 65 (1965), and the decision below warrants plenary review on that ground alone. But in addition, as the judges who dissented from the panel decision and the denial of rehearing en banc recognized, the decision below is inconsistent with this Court's precedents and in square conflict with the decision of the District of Columbia Circuit in *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (2007) (*DKT*). This Court's review is warranted.

A. The Court Of Appeals Invalidated A Significant Provision Of An Act Of Congress And Of An Important Federal Program

1. The Leadership Act directs the President to establish a comprehensive international strategy to fight the transmission of HIV/AIDS, with "the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." 22 U.S.C. 7611(a)(12) (2006 & Supp. IV 2010). Among other things, the Act seeks to reduce behavioral

risks by "educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (2006 & Supp. IV 2010). Congress thus directed that all prevention efforts funded under the Act should have as a priority the promotion of the government's goal that the underlying causes of HIV/AIDS, including prostitution and sex trafficking, should be reduced or eliminated.

In furthering and communicating that goal through the programs and services that the Leadership Act subsidizes, the government is entitled to "use criteria to ensure that its message is conveyed in an efficient and effective fashion." *DKT*, 477 F.3d at 762. It would make little sense for the government to provide billions of dollars for the treatment and prevention of HIV/AIDS, including for the reduction of behavioral risks like prostitution and sex trafficking, and yet to engage as partners in that effort organizations that are neutral toward or that even affirmatively disagree with efforts to oppose those types of behavior. Simply put, the effectiveness of the government's message would be substantially undermined if the same organizations hired to further the program's goals (including the reduction of prostitution and sex trafficking because of their role in the spread of HIV/AIDS) and to communicate that message through their provision of HIV/AIDS programs and services, could advance an opposite viewpoint in their privately-funded operations. Section 7631(f) does no more than to ensure that if respondents wish to re-

ceive funds under the Leadership Act, "[they] must communicate the message the government chooses to fund. This does not violate the First Amendment." *Id.* at 764.

2. This Court has recognized that although the government may speak through its own representatives, officers, or employees, it may also enlist the assistance of private entities or organizations to convey its chosen message. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). When the government "is the speaker or when it enlists private entities to convey its own message," the government may "regulate the content of what is or is not expressed." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see *ibid.* ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). For that reason, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Ibid.*; see *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances * * * in which the government use[s] private speakers to transmit specific information pertaining to its own program.") (internal quotation marks omitted).[4]

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[4] A viewpoint-based funding condition is subject to heightened scrutiny when it is "aimed at the suppression of dangerous ideas," *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950)), but in this case respondents have not argued, and the panel majority did not conclude, that Section 7631(f)'s policy requirement is aimed at such suppression. As Judge Straub explained in dissent, "[t]here is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy

Here, Congress found in enacting the Leadership Act that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23); see p. 5, *supra*. Congress therefore concluded that a comprehensive strategy to address HIV/AIDS should attempt to reduce prostitution and sex trafficking in countries where the federally-funded programs at issue are provided. "Spending money to convince people at risk of HIV/AIDS to change their behavior is necessarily a message," *DKT*, 477 F.3d at 761, and Congress has required private organizations to adhere to that message by adopting a policy that explicitly opposes prostitution and sex trafficking. See, *e.g.*, *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (Under the Spending Clause, Congress has the power to "attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'") (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980)).

In light of Congress's findings, Section 7631(f)'s policy requirement is plainly a "legitimate and appropriate" means to ensure that the government's goals are advanced and its message communicated wherever the Act's funds are spent. *Rosenberger*, 515 U.S. at 833. That is especially true in light of the acute difficulties of monitoring the way in which private organizations pro-

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Requirement was to suppress pro-prostitution views," and "[t]he Policy Requirement and Guidelines therefore in no way silence government criticism or contrary views on prostitution and HIV/AIDS." App., *infra*, 83a-84a.

vide HIV/AIDS programs and services throughout the world. The policy requirement helps to guarantee that the organizations receiving Leadership Act funds act consistently with Congress's goals in their overseas operations. In addition, the affiliation guidelines issued by HHS and USAID cabin the effects of Section 7631(f)'s funding condition to the scope of Leadership Act programs and services and thus minimize any burden on respondents' First Amendment rights. See pp. 26-28, *infra*.

3. The panel majority reasoned that the Act's policy requirement is impermissible because it affirmatively compels speech by the recipients of the Act's funds. See App., *infra*, 25a. This Court has never held, however, that it matters whether conditions on the receipt of federal funding compel speech or silence. Indeed, the Court has held that the distinction is without constitutional significance in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance."). There is no reason, then, that the distinction should assume constitutional significance in the context of funding conditions, where recipients may avoid the conditions altogether simply by declining to accept the federal funds at issue. See, *e.g.*, *Rust*, 500 U.S. at 199 n.5 ("[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy."); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) ("[The recipient] may terminate its participation in the [federal] program and thus avoid the requirements.").

The reasoning of this Court's decisions on funding conditions likewise lends no support to the panel majority's novel affirmative-negative dichotomy. In *Rust*, for instance, the Court upheld against a First Amendment challenge restrictions that barred federally-funded family-planning programs from providing abortion counseling or encouraging abortion as a method of family planning. See 500 U.S. at 179-181, 192-193. The Court recognized that "[t]he [g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." *Id.* at 193. Similarly, in *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), this Court upheld a restriction on lobbying by nonprofit organizations that were allowed to receive tax-deductible contributions. See *id.* at 550. The Court held that Congress did not violate the First Amendment by choosing "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.* at 544.

Those cases do not suggest that the constitutionality of a federal funding condition under the First Amendment turns on whether the recipient must espouse a message that the government funding is intended to promote or refrain from espousing a message that is contrary to the funding program. In either case, what matters is that the government has elected to selectively fund a program aimed at encouraging or discouraging certain activities of public interest: abortion counseling in *Rust*, certain types of lobbying in *Regan*, and foreign prostitution and sex trafficking in this case. See App., *infra*, 99a (Cabranes, J., dissenting from the denial of rehearing en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional dis-

tinction between 'affirmative' and 'negative' speech restrictions."); *id.* at 103a ("[I]t is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention.").

4. The panel majority did not rest its decision solely on its distinction between affirmative and negative restrictions on speech. Indeed, the panel majority acknowledged that in some circumstances the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program." App., *infra*, 32a; see *ibid.* ("[I]f the government were to fund a campaign urging children to 'Just Say No' to drugs, we do not doubt that it could require grantees to state that they oppose drug use by children."). But that is so, the panel majority reasoned, when "the government's program *is*, in effect, its message." *Ibid.* In the panel majority's view, that is not the case here because "[t]he stated purpose of the Leadership Act is to fight HIV/AIDS" rather than to fight prostitution and sex trafficking. *Ibid.* (emphasis omitted); see *id.* at 32a-33a ("[Petitioners] cannot now recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign.").

That approach cannot be correct. In cases involving restrictions challenged on First Amendment grounds, it would require courts to decide, on a case-by-case basis, which of Congress's funding conditions are truly critical to the federal programs to which they are attached. Courts would have to decide whether, in their view, Congress's chosen message is "central" rather than "subsidiary" to a given federal funding program. App., *infra*, 33a (internal quotation marks omitted). See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev.*

Corp., 429 U.S. 252, 265 n.11 (1977) ("Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute.") (quoting *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973)); *McGinnis*, 410 U.S. at 276 ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate.").

Even taking the court of appeals' test on its own terms, however, the panel majority erred in holding that Section 7631(f)'s policy requirement is not central to the purposes of the Leadership Act. App., *infra*, 32a-34a. As explained above, Congress did not want to address only the *effects* of HIV/AIDS; it also wanted to address the *causes* of its transmission, including types of behavior, like prostitution and sex trafficking, that place certain groups at high risk of contracting HIV/AIDS. See pp. 3-5, *supra*. Congress determined when it enacted the Leadership Act that reducing and eradicating prostitution and sex trafficking are of great importance in preventing the spread of HIV/AIDS. The panel majority suggested no appropriate basis for disagreeing with that legislative judgment. The government's message regarding prostitution and sex trafficking is an integral feature of the funding program. In this critical respect, in the panel's words, "the government's program *is*, in effect, its message." App., *infra*, 32a.

The panel majority reasoned that advocating against prostitution is not central to the Leadership Act because Section 7631(f) exempts certain entities. See 22 U.S.C. 7631(f) ("[T]his subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS

Vaccine Initiative or to any United Nations agency."). As a threshold matter, "the relevance of a statute's underinclusiveness is that it may reveal discrimination on the basis of viewpoint or content, or may undercut the statute's purported non-discriminatory purpose." *Ruggiero* v. *FCC*, 317 F.3d 239, 250-251 (D.C. Cir.), cert. denied, 540 U.S. 813 (2003). Here, "[b]ecause viewpoint discrimination raises no First Amendment concerns when the government is speaking, the underinclusiveness of the certification requirement is immaterial." *DKT*, 477 F.3d at 763 n.5; see *Regan*, 461 U.S. at 547-548 (upholding lobbying restrictions that applied to nonprofit organizations but exempted veterans' organizations).

In any event, the exempt entities are not similarly situated to the private nongovernmental organizations subject to Section 7631(f). One of the exempt entities, the International AIDS Vaccine Initiative (IAVI), is a nongovernmental organization that focuses on developing a vaccine for HIV/AIDS. See App., *infra*, 91a; 22 U.S.C. 2222(l) (2006 & Supp. IV 2010). Congress reasonably could have concluded that there is little risk IAVI will undermine the Leadership Act's opposition to prostitution and sex trafficking. The remaining exempt entities—the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; and United Nations agencies—are public international organizations composed primarily or exclusively of sovereign states. See App., *infra*, 91a-92a. The terms of the United States' participation in those organizations are governed by treaties or international agreements. See 22 U.S.C. 288, note (2006 & Supp. IV 2010); Exec. Order No. 13,395, 3 C.F.R. 209 (2007). Congress could not unilaterally require those organizations to adopt policies

opposing prostitution or sex trafficking, and their international nature makes it unlikely that their views or actions will be specially attributed to the United States (particularly in light of Congress's clear message in the Leadership Act itself).

5. Finally, the panel majority sought to draw support for its decision from this Court's cases on compelled speech. See App., *infra*, 25a-26a; see also *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). Those cases, however, did not involve Congress's spending power. Rather, "[i]n each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. None involved the government's selective funding of organizations best equipped to communicate its message." *DKT*, 477 F.3d at 762 n.2. As the District of Columbia Circuit has recognized, that distinction is critical. "Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education, *Barnette*, 319 U.S. at 629, or access to public roads, *Wooley*, 430 U.S. at 715." *Ibid.* (parallel citations omitted).

By ignoring that critical distinction, the panel majority held unconstitutional a statutory condition on the receipt of federal funds that, in Congress's view, serves a valuable purpose: to ensure that a particular message—*i.e.*, that high-risk behaviors, including prostitution and sex trafficking, should be reduced as part of the fight against HIV/AIDS—is communicated effectively by private partners under the Leadership Act. That invalidation of an Act of Congress in itself warrants this

Court's review. Moreover, the decision below allows virtually all of the private entities that receive many billions of dollars in federal aid to advance the government's program to ignore a condition that Congress deemed important to their participation. If that decision is left unreviewed, the government will have to stand idly by while its private partners advance views that are inconsistent with or even directly contrary to, and that thus substantially undermine, the comprehensive strategy against HIV/AIDS outlined by Congress in the Act. That consequence alone warrants the grant of certiorari.

B. The Decision Below Creates A Square Circuit Conflict

1. The panel majority's approach in this case directly conflicts with the District of Columbia Circuit's decision in *DKT*. In *DKT*, the District of Columbia Circuit considered a First Amendment challenge to Section 7631(f) brought by a private organization, DKT International, Inc., that provided HIV/AIDS prevention programming in foreign countries in part with USAID grant funds. See 477 F.3d at 760-761. DKT refused to adopt a policy opposing prostitution "because this might result in stigmatizing and alienating many of the people most vulnerable to HIV/AIDS—the sex workers." *Id.* at 761 (internal quotation marks omitted). DKT argued that the policy requirement in Section 7631(f) was unconstitutional for the same reason that respondents have advanced: "it forces DKT to convey a message with which it does not necessarily agree." *Ibid.*

The District of Columbia Circuit rejected that argument. The court recognized that the government "may hire private agents to speak for it," *DKT*, 477 F.3d at 761 (citing *Rust*, 500 U.S. 173), and in communicating its message through private entities "the government

can—and often must—discriminate on the basis of viewpoint," *ibid.* (citing *Rosenberger*, 515 U.S. at 833). The court observed that the Leadership Act's "objective is to eradicate HIV/AIDS," and "[o]ne of the means of accomplishing this objective is for the United States to speak out against legalizing prostitution in other countries." *Ibid.* As the court explained, "[t]he Act's strategy in combating HIV/AIDS is not merely to ship condoms and medicine to regions where the disease is rampant," but also to "foster[] behavioral change, see, *e.g.*, 22 U.S.C. § 7601(22)(E), and spread[] 'educational messages,' *id.* § 7611(a)(4)." *Ibid.* The court reasoned that "convinc-[ing] people at risk of HIV/AIDS to change their behavior is necessarily a message." *Ibid.*

The District of Columbia Circuit thus disagreed with DKT's contention that the government had created "a program to encourage private speech." *DKT*, 477 F.3d at 762 (quoting *Rosenberger*, 515 U.S. at 833). Rather, the court held, the government is "us[ing] private speakers to transmit specific information pertaining to its own program," *ibid.* (quoting *Rosenberger*, 515 U.S. at 833), and "as in *Rust*, 'the government's own message is being delivered,'" *ibid.* (quoting *Velazquez*, 531 U.S. at 541). The court also rejected DKT's reliance on this Court's compelled-speech decisions, because in those cases "the penalty for refusing to propagate the message was denial of an already-existing public benefit," like access to "public education" or "public roads." *Id.* at 762 n.2. None of those cases, the court noted, "involved the government's selective funding of organizations best equipped to communicate its message." *Ibid.*

Because the government may "communicate a particular viewpoint through its agents and require those agents not convey contrary messages," the District of

Columbia Circuit reasoned, "it follows that in choosing its agents, the government may use criteria to ensure that its message is conveyed in an efficient and effective fashion." *DKT*, 477 F.3d at 762. According to the court, "[t]his is particularly true where the government is speaking on matters with foreign policy implications," as it is through the Leadership Act. *Ibid.* The court correctly concluded that "[t]he effectiveness of the government's viewpoint-based program would be substantially undermined, and the government's message confused, if the organizations hired to implement that program * * * could advance an opposite viewpoint in their privately-funded operations." *Id.* at 762-763 (internal quotation marks omitted).

2. The panel majority's reasoning in this case squarely conflicts with the District of Columbia Circuit's reasoning in *DKT*, which "rejected an almost identical challenge to the Leadership Act by a potential grantee that refused to adopt a policy opposing prostitution." App., *infra*, 94a (Straub, J., dissenting). Notably, the panel majority cited *DKT* once but made no effort to distinguish that case. See *id.* at 31a.[5] All of the judges who addressed the question at the rehearing en banc

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[5] The panel majority did distinguish a different, much earlier case, *DKT Memorial Fund Ltd.* v. *Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989), on the ground that it "centered around a restriction on the First Amendment activities of *foreign* [nongovernmental organizations] receiving U.S. government funds." App., *infra*, 34a. That would not distinguish the District of Columbia's subsequent decision in *DKT*, which involved a U.S.-based nongovernmental organization. See 1:05-cv-1604 Doc. No. 1, at 4 (D.D.C. Aug. 11, 2005) ("Plaintiff DKT International is a U.S.-based, charitable organization providing family-planning and HIV/AIDS prevention services in eleven countries around the world."); see *id.* at 2 ("Plaintiff DKT International is a not-for-profit corporation with headquarters [in Washington, D.C.]").

stage therefore agreed that the panel decision and *DKT* are flatly inconsistent. See *id.* at 107a-108a (Pooler, J., concurring in the denial of rehearing en banc) ("The unconstitutional conditions doctrine is messy and unsettled," and thus it is "[not] surprising that our decision created a circuit split."); *id.* at 103a (Cabranes, J., dissenting from the denial of rehearing en banc) ("[T]he panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge to the Leadership Act by another grantee that refused to adopt a policy opposing prostitution.").

Moreover, when this case was remanded for consideration of the then-newly issued guidelines, the district court extended injunctive relief to two new plaintiffs named in an amended complaint, respondents GHC and InterAction, which are associations of nongovernmental organizations that collectively include most of the groups based in the United States that receive funding under the Leadership Act. See App., *infra*, 251a-252a.[6] It is therefore uncertain that there would be future litigation on this issue in other courts of appeals, because the lower courts' injunction here prevents the government from enforcing Section 7631(f) with respect to most of the U.S.-based organizations that receive funds

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[6] At the present time, the injunction extends to all members of both GHC and InterAction. Although GHC recently announced that it is closing its operations, see Global Health Council, *GLOBAL HEALTH COUNCIL TO CLOSE OPERATIONS* (Apr. 20, 2012), http://www.globalhealth.org, the courts below have not yet been asked to rule on the effect of that association's dissolution. In any event, as far as the government is aware there is no significant barrier to a GHC member's joining InterAction, which would mean that the government will remain unable to enforce Section 7631(f) with respect to most of the U.S.-based organizations that receive Leadership Act funds if the decision below is permitted to stand.

under the Leadership Act. The direct conflict between the Second and the District of Columbia Circuits warrants this Court's review in this case.

3. The decision below is in considerable tension with the decisions of this Court and several other circuits in another respect. The panel majority rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. App., *infra*, 35a-36a. "It may very well be that the Guidelines afford [respondents] an adequate outlet for expressing their opinions on prostitution," the panel majority stated, "but there remains, on top of that, the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution." *Id.* at 36a. According to the panel majority, that requirement—*i.e.*, that the entity receiving Leadership Act funds have a policy opposing prostitution and sex trafficking—renders the funding condition unconstitutional, even if an affiliated entity is free to take contrary positions on the sex trade and sex trafficking.

That reasoning is not consistent with this Court's decisions addressing similar affiliation guidelines. For instance, the restriction at issue in *Regan* prevented nonprofit organizations from lobbying with tax-deductible contributions, but a related provision permitted those organizations to form affiliates that could engage in lobbying activities. See 461 U.S. at 544. The Court noted that "dual structure" in upholding the restriction, *ibid.*, observing that an affected organization had not been denied "any independent benefit on account of its intention to lobby," *id.* at 545. See *id.* at 553 (Blackmun, J., concurring) (reasoning that the lobbying restriction

was permissible because of the affiliate provision); see also *Rust*, 500 U.S. at 198 ("Congress has merely refused to fund [abortion-related] activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the [federal] project in order to ensure the integrity of the federally funded program."). By contrast, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), the Court invalidated a federal law prohibiting noncommercial television and radio stations that received federal grants from editorializing, but the Court noted that if Congress had permitted stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Id.* at 400.

In light of *Regan*, *League of Women Voters*, and *Rust*, other circuits have found that affiliation guidelines cure any constitutional difficulty, because they allow funding recipients to cabin the effects of a restriction on speech to the scope of the federally funded program at issue. See, *e.g.*, *DKT*, 477 F.3d at 763 ("Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution."); *Planned Parenthood of Mid-Mo. and E. Kan., Inc.* v. *Dempsey*, 167 F.3d 458, 463-464 (8th Cir. 1999) (upholding a Missouri statute that "requir[d] abortion services to be provided through independent affiliates"); *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1026 (9th Cir.) (upholding, as "consistent with the decisions in *Regan* and *League of Women Voters*," regulations "requir[ing] that if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activ-

ities"), cert. denied, 525 U.S. 1015 (1998). As other courts of appeals have recognized, affiliation guidelines like those promulgated by HHS and USAID ensure that recipients of federal funding are not effectively precluded from exercising their First Amendment rights.

The Second Circuit reasoned that the HHS and USAID affiliation guidelines do not cure any constitutional defect in this case because respondents must espouse a particular message rather than refrain from speaking. App., *infra*, 35a-36a. That simply misunderstands the First Amendment value of affiliate structures. Regardless of whether a funding condition requires the recipient to speak or remain silent, the relevant question is whether the condition "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197. Here, the affiliation guidelines—which are modeled on the program integrity requirements upheld in *Rust* but which have been made more flexible to account for the challenges of operating overseas—cabin the effects of Section 7631(f)'s funding condition to the scope of Leadership Act programs and services.[7]

C. This Case Is A Good Vehicle For Addressing Issues Of Recurring Importance

1. In addition to erroneously enjoining an Act of Congress on constitutional grounds, the panel majority's decision, by introducing a novel distinction between affirmative and negative restrictions on speech, unneces-

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[7] The affilation guidelines are modeled on the program integrity requirements in *Velazquez*, see *Velazquez* v. *Legal Servs. Corp.*, 164 F.3d 757, 761-762 (2d Cir. 1999), which in turn were modeled on those upheld in *Rust*.

sarily complicates the doctrine of unconstitutional conditions. See *Rust*, 500 U.S. at 205 (referring to the doctrine as "a troubled area of [this Court's] jurisprudence"); see also App. *infra*, 96a (Straub, J., dissenting) ("Because the majority today * * * does more to further complicate the doctrine [of unconstitutional conditions] than to clarify it, the Supreme Court may wish to grant certiorari to set us straight."); *id.* at 99a (Cabranes, J., dissenting from the denial of rehearing en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions."). Indeed, although Judge Pooler was a member of the panel majority, she recognized at the rehearing en banc stage that "[t]he unconstitutional conditions doctrine is messy and unsettled"; there is "current doctrinal disarray"; and in her view the en banc court's resolution of the question "simply could not substitute for the Supreme Court's attention." *Id.* at 107a-108a, 110a (Pooler, J., concurring in the denial of rehearing en banc); cf. *id.* at 100a n.2 (Cabranes, J., dissenting from the denial of rehearing en banc) ("Judge Pooler would prefer the Supreme Court's attention. So be it.") (internal quotation marks omitted). The lower court's need for guidance underscores the importance of this Court's review.

2. Although the decision below affirmed a preliminary injunction, further proceedings in the district court would not bear on the constitutional question presented here. The panel majority "conclude[d] that [Section] 7631(f), as implemented by the Agencies, falls well beyond what the Supreme Court and [the Second Circuit] have upheld as permissible conditions on the receipt of government funds." App., *infra*, 3a. Although the panel majority subsequently stated that Section 7631(f) "*likely*

violates the First Amendment by impermissibly compelling [respondents] to espouse the government's viewpoint on prostitution," the panel majority's reasoning was that Section 7631(f) *actually* violates the First Amendment because it compels such speech. *Id.* at 17a (emphasis added). Neither the panel majority nor respondents have identified how further proceedings before the district court could establish that the funding condition does not violate the First Amendment. *Id.* at 104a-105a (Cabranes, J., dissenting from the denial of rehearing en banc). Accordingly, in the face of an injunction that bars the enforcement of an Act of Congress on constitutional grounds, there is no reason to delay this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2012

12-10

No.

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 08-4917-CV

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL, INTERACTION, PLAINTIFFS-APPELLEES

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, RAJIV SHAH,* IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, AND HIS SUCCESSORS, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, THOMAS R. FRIEDEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HIS SUCCESSORS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HER SUCCESSORS, DEFENDANTS-APPELLANTS**

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* Named officials have been substituted for their predecessors pursuant to Fed. R. App. P. 43(c)(2).

** The Clerk of Court is directed to amend the official caption to read as shown above.

Argued: Dec. 9, 2010
Decided: July 6, 2011

OPINION

Before: STRAUB, POOLER, and B.D. PARKER, Circuit Judges.

Judge STRAUB dissents in a separate opinion.

B.D. PARKER, JR., Circuit Judge:

Defendants—Appellants the U.S. Agency for International Development ("USAID"), the U.S. Department of Health and Human Services ("HHS"), and the U.S. Centers for Disease Control and Prevention ("CDC") (collectively, the "Agencies" or "Defendants") appeal from preliminary injunctions entered by the United States District Court for the Southern District of New York (Marrero, *J.*). The district court enjoined the Agencies from enforcing 22 U.S.C. § 7631(f), a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), 22 U.S.C. § 7601 *et seq.*, against Plaintiffs-Appellees Alliance for Open Society International, Inc. ("AOSI"), Pathfinder International ("Pathfinder"), Global Health Council ("GHC"), and InterAction. These are non-governmental organizations ("NGOs") engaged in the international fight against HIV/AIDS that receive funding under the Act.

Section 7631(f) of the Leadership Act provides that "[n]o funds made available to carry out this Act . . . may be used to provide assistance to any group or orga-

nization that does not have a policy explicitly opposing prostitution." This provision, as construed and implemented by the Agencies, requires NGOs, as a condition of receiving Leadership Act funds, to adopt a policy explicitly opposing prostitution, and prohibits recipients from engaging in any activities that are "inconsistent" with an anti-prostitution stance. Certain other recipients of Leadership Act funds, such as the World Health Organization, are not bound by this restriction.

As explained below, we conclude that § 7631(f), as implemented by the Agencies, falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds. Section 7631(f) does not merely require recipients of Leadership Act funds to refrain from certain conduct, but goes substantially further and compels recipients to espouse the government's viewpoint. *See* 45 C.F.R. § 89.1. Consequently, we agree with the district court that Plaintiffs have demonstrated a likelihood of success on the merits. Finding no abuse of discretion by the district court, we affirm.

BACKGROUND

The Leadership Act

In 2003, Congress passed the Leadership Act "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics." 22 U.S.C. § 7603 (Supp. III 2009).[1] The Act designates sev-

[1] The Leadership Act was reauthorized and amended in 2008. Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008,

eral avenues through which this international campaign is to be run, including "5-year, global strategies"; the development of vaccines and treatments; and "public-private" partnerships between federal agencies and NGOs, which Congress recognized "have proven effective in combating the HIV/AIDS pandemic." §§ 7601(18), 7603.

The Act reflects Congress's concern with the social, cultural, and behavioral causes of HIV/AIDS. *See* § 7601(15). Section 7601(23), one of forty-one congressional "findings" set forth in § 7601, addresses prostitution: "Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic."

Congress imposed two prostitution-related conditions on Leadership Act funding. First, it specified that no funds made available to carry out the Act may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. § 7631(e). Second, it imposed a Policy Requirement, which specifies that:

> No funds made available to carry out this Act . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World

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Pub. L. No. 110-293, 122 Stat. 2918; *see* 22 U.S.C. § 7671. We cite to the current version of the Act.

> Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

§ 7631(f). This litigation involves only the Policy Requirement. Plaintiffs do not challenge the Requirement's "sex trafficking" component.

Defendants' Initial Implementation of the Policy Requirement

The defendant Agencies implement the Leadership Act by, in part, funding U.S.-based NGOs involved in the international fight against HIV/AIDS. AOSI and Pathfinder are two such organizations. AOSI runs a program in Central Asia that aims to prevent the spread of HIV/AIDS by reducing injection drug use, while Pathfinder works to stem the spread of HIV/AIDS by providing family planning and reproductive health services in more than twenty countries. Both receive funding from sources other than the Agencies and neither supports prostitution. But their work does involve engaging, educating, and assisting groups, such as prostitutes, that are vulnerable to HIV/AIDS, as well as advocating approaches and discussing strategies for fighting HIV/AIDS among prostitutes at, among other places, policy conferences and forums.

After the Leadership Act was enacted, the Department of Justice's Office of Legal Counsel ("OLC") warned that applying the Policy Requirement to U.S.-based organizations would be unconstitutional. Heeding that warning, Defendants initially refrained from enforcing it against U.S.- based NGOs. OLC subsequently changed course and withdrew what it characterized as its prior "tentative advice," asserting that "there are reasonable arguments to support the[] constitutionality"

of applying the Policy Requirement to U.S.-based organizations, and, starting in mid-2005, the Agencies began applying the Requirement to U.S.-based grantees. Specifically, USAID issued a directive requiring that U.S.-based organizations, as a condition of receiving funding under the Act, "must have a policy explicitly opposing prostitution." Defendants also construed the Policy Requirement as prohibiting grantees from engaging in activities that were inconsistent with a policy opposing prostitution. In an effort to remain eligible for Leadership Act funding, both AOSI and Pathfinder adopted policy statements. Pathfinder's, for example, stated that it "opposes prostitution and sex trafficking because of the harm they cause primarily to women."

The District Court's First Decision

In 2005, AOSI and Pathfinder sued the Agencies, contending that conditioning Leadership Act funding on the affirmative adoption of a policy opposing prostitution violated the First Amendment by compelling grantees to adopt and voice the government's viewpoint on prostitution, and by restricting grantees from engaging in privately funded expression that the Agencies might deem insufficiently opposed to prostitution. They also asserted that the Policy Requirement was unconstitutionally vague with respect to what sorts of prostitution-related activity and expression were, in fact, restricted.

The district court granted AOSI and Pathfinder preliminary injunctive relief. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) ("*Alliance I*"). The court engaged in a thorough analysis of the Supreme Court's "unconstitutional conditions" jurisprudence—focusing, in particu-

lar, on *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), *FCC v. League of Women Voters of California*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), and *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The court first concluded that, because the Policy Requirement substantially impaired First Amendment protected activity conducted by private entities with private funds as a condition of receiving a government benefit, heightened scrutiny was warranted. *Alliance I*, 430 F. Supp. 2d at 259. The court then concluded that the Policy Requirement, as applied to AOSI and Pathfinder, violated the First Amendment because it was not narrowly tailored, imposed a viewpoint-based restriction on their use of private funds without allowing for adequate alternative channels of communication, and "compel[led] speech by affirmatively requiring [them] to adopt a policy espousing the government's preferred message." *Id.* at 268-76. Accordingly, the court held that AOSI and Pathfinder had demonstrated a likelihood of success on the merits, and had met their burden of showing irreparable harm. *Id.* at 276, 278. The district court thus preliminarily enjoined Defendants from enforcing the Policy Requirement against AOSI or Pathfinder, and Defendants appealed.

The First Appeal

During the course of the first appeal, the Agencies informed us that HHS and USAID were developing guidelines that would allow grantees to establish or work with separate affiliates that would not be subject to the Policy Requirement. The Agencies were of the view that the guidelines would satisfactorily address the relevant constitutional concerns in accordance with our

decision in *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 223-24 (2d Cir. 2006) ("[I]n appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression."). After the guidelines became effective, we remanded the case to the district court to determine in the first instance whether interlocutory relief continued to be appropriate. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 254 Fed. Appx. 843, 846 (2d Cir. 2007) ("*Alliance II*").

The Guidelines

The Guidelines permit recipients of Leadership Act funds to partner with affiliate organizations that do not comply with the Policy Requirement, provided that the recipient and affiliate maintain "adequate separation" so as not to "threaten the integrity of the Government's programs and its message opposing prostitution." HHS Guidance, 72 Fed. Reg. 41,076 (July 26, 2007); USAID Acquisition & Assistance Policy Directive ("AAPD") 05-04 Amendment 1 (July 23, 2007). The Guidelines (which, as discussed *infra*, were slightly revised in 2010), require recipients to have "objective integrity and independence" from any affiliate that "engages in activities inconsistent with [an] opposition to the practice[ ] of prostitution . . . ('restricted activities')." 45 C.F.R. § 89.3 (2010).

The Guidelines, as initially promulgated, provided that a recipient would be deemed to have "objective integrity and independence"—i.e., adequate separation—from an affiliate if (1) the two entities are legally sepa-

rate; (2) no Leadership Act funds are transferred to the affiliate or used to subsidize its restricted activities; and (3) the entities are physically and financially separate. 72 Fed. Reg. at 41,076. The 2007 Guidelines elaborated that "whether sufficient physical and financial separation exists" would be determined "case-by-case," and set forth five, non-exclusive factors relevant to that determination: (i) the existence of separate personnel, management, and governance; (ii) the existence of separate accounts and records; (iii) the degree of separation between the recipient's facilities and facilities used by the affiliate to conduct restricted activities; (iv) the extent to which signs and other forms of identification distinguish the two entities; and (v) the extent to which the government and the Leadership Act program are "protected from public association with the affiliated organization and its restricted activities." *Id.* at 41,077.

The District Court's Second Decision

On remand, AOSI and Pathfinder moved to amend the complaint to add Global Health Council and InterAction (together, the "Associations") as plaintiffs, and to extend the preliminary injunction to cover the Associations. GHC is an alliance of organizations dedicated to international public health. InterAction is an alliance of international development and humanitarian NGOs. Many of the Associations' U.S.-based members—which include Pathfinder, a member of both GHC and InterAction—participate in the international fight against HIV/AIDS, receive Leadership Act funding, are therefore subject to the Policy Requirement, and desire relief from it. These member organizations' HIV/AIDS prevention work includes administering health services and other programs that expressly target at-risk groups like

prostitutes. They also engage in advocacy and discussion concerning controversial global health issues—for example, best practices for reducing HIV/AIDS among prostitutes—at policy forums and conferences.

In August 2008, the district court permitted GHC and InterAction to join the litigation, extended the preliminary injunction to them, and went on to consider whether interlocutory relief continued to be warranted in light of the Guidelines. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 570 F. Supp. 2d 533 (S.D.N.Y. 2008) ("*Alliance III*"). The court held that it was, concluding that the Guidelines did not affect its previous determination that the Policy Requirement impermissibly compelled speech. The court reasoned that "[w]hile the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution," the clause requiring them to espouse the government's viewpoint "remains intact." *Id.* It also concluded that heightened scrutiny remained applicable because the Policy Requirement discriminates based on viewpoint, and that the Guidelines were too burdensome to cure the Requirement's constitutional defects. *Id.* at 546-49. Accordingly, the court declined to disturb its preliminary injunction. Defendants appealed from both the 2006 and 2008 preliminary injunction orders.

Additional Guidance Promulgated by Defendants

In April 2010, while this appeal was pending, HHS and USAID promulgated further guidance pertaining to the Policy Requirement—HHS in a formal regulation, USAID in a policy directive. HHS, Organizational Integrity of Entities That Are Implementing Programs and

Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (Apr. 13, 2010) (codified at 45 C.F.R. pt. 89); USAID AAPD 05-04 Amendment 3 (Apr. 13, 2010). The new guidance specifies that in order to comply with the Policy Requirement, a Leadership Act grantee must affirmatively state in the funding document that it is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children," 45 C.F.R. § 89.1; AAPD 05-04 Amend. 3 at 2, and reaffirms that a recipient "cannot engage in activities that are inconsistent with [its] opposition to prostitution," 75 Fed. Reg. at 18,760. Neither the 2010 nor the 2007 guidance offers recipients insight as to what activities may be deemed "inconsistent" with an "opposition to prostitution."

The new guidance also modified the Guidelines for partnering with an affiliate that does not comply with the Policy Requirement. *See* 45 C.F.R. § 89.3. For example, under the revised Guidelines, which profess to "allow more flexibility for funding recipients," 75 Fed. Reg. at 18,762, legal separation is no longer required but only one factor to be considered, and separate management is no longer expressly identified as a relevant factor, in determining whether a recipient has "objective integrity and independence" from an affiliate, 45 C.F.R. § 89.3.

DISCUSSION

I. Standing

The Agencies initially argue that Plaintiffs lack standing. Plaintiffs bear the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). "Because

standing is challenged [here] on the basis of the pleadings, we accept as true all material allegations of the complaint, and must construe the complaint in favor of [Plaintiffs]." *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008) (internal quotation marks omitted). We review questions of standing de novo. *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010).

Three elements comprise the "irreducible constitutional minimum" of standing: (1) the plaintiff must have suffered an injury-in-fact—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the challenged conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130.

Because GHC and InterAction are suing on behalf of their members, each must establish associational standing by demonstrating that (a) at least one of the association's members would otherwise have standing to sue in its own right—i.e., has constitutional standing; (b) the interests the association seeks to protect are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The district court held that Plaintiffs had established standing. As explained below, we conclude that the district court was correct.

A. Injury-in-Fact

We have little difficulty finding that Plaintiffs have alleged constitutional injury-in-fact, and face actual or imminent harm as a result of the Policy Requirement. They allege that the Requirement has compelled AOSI, Pathfinder, and many of the Associations' members to adopt policy statements that they otherwise would not have adopted, and that it restricts them from engaging in privately funded activities and speech that is essential to their work but that the Agencies might deem inconsistent with an opposition to prostitution.[2] Pathfinder, for example, "wishe[s] to remain neutral" on the issue of prostitution, but adopted an anti-prostitution policy statement in order to avoid losing Leadership Act funding, and alleges that it would, in the absence of the injunctions, self-censor its prostitution-related speech at conferences, in publications, and on its website.

Defendants contend that the alleged injuries are merely conjectural because no plaintiff has "attempted to form an affiliate" and "avail [itself] of th[at] alternative avenue[] for communication." Appellants' Br. 22-23. But standing jurisprudence makes clear that Plaintiffs need not go through the potentially burdensome process of setting up an affiliate organization before they can bring a First Amendment challenge. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) (finding standing where newly enacted statute had not yet been enforced because compliance would have required plaintiffs "to take significant and costly . . . measures," and "the alleged

[2] Plaintiffs allege that twenty of GHC's members and twenty-eight of InterAction's members have adopted anti-prostitution policy statements that they did not wish to make.

danger of th[e] statute [was], in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"). Moreover, as elaborated upon below, *infra* at 238-40, forming an affiliate cannot remedy the grantee's injury resulting from being compelled to affirmatively state the government's position on prostitution.

B. Associational Standing

Defendants contend that GHC and InterAction lack associational standing because they fail the third prong of the *Hunt* test, under which they must establish that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343, 97 S. Ct. 2434. We disagree. As an initial matter, the third prong of the associational standing test is "prudential," not constitutional, and is "best seen as focusing on . . . matters of administrative convenience and efficiency." *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 555-56, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996). Accordingly, district courts possess a degree of discretion in applying it. *See Ctr. for Reprod. Law v. Bush*, 304 F.3d 183, 196 (2d Cir. 2002) (Sotomayor, J.) ("[T]he prudential requirements of standing have been developed by the Supreme Court on its own accord and applied in a more discretionary fashion as rules of judicial self-restraint further to protect, to the extent necessary under the circumstances, the purpose of Article III." (internal quotation marks omitted)). Here, the district court correctly concluded that "neither the claims asserted nor the relief requested by the Associations would require any significant participation of indi-

vidual members in the lawsuit." *Alliance III*, 570 F. Supp. 2d at 543.

We agree with the district court that the "relief requested" component of the third *Hunt* prong has been satisfied because the Associations seek an injunction barring enforcement of the Policy Requirement, which will not necessitate the participation of individual members in the lawsuit. *See Warth v. Seldin*, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (when an association seeks equitable relief, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured"). However, as the Agencies correctly assert, the third prong of the *Hunt* test is not "automatically satisfie[d]" whenever an association "request[s] equitable relief rather than damages." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004). Courts "also must examine the claims asserted to determine whether they require individual participation." *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993); *see Bano*, 361 F.3d at 714 ("[An] organization lacks standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof. . . . " (internal quotation marks omitted)).

The Agencies argue that "[i]ndividualized proof is required" in this case because resolving whether the Guidelines permit recipients to set up adequate alternative channels for protected expression necessitates a fact-specific determination for each recipient. Appellants' Br. 25. First, it is self-evident that, as the district court concluded, individualized proof is *not* required for

the compelled speech and vagueness claims, "as it is the conduct of Defendants in the form of the Policy Requirement and the Guidelines that will be the primary subject of inquiry." *Alliance III*, 570 F. Supp. 2d at 543. With respect to the adequate alternative channels analysis, we agree with the district court that while it will "require a more thorough factual development to establish the extent of the burden on the Associations' members," individualized evidence of members' efforts to comply with the Guidelines "would be duplicative and redundant[,] counsel[ing] in favor of granting associational standing in the interests of judicial economy." *Id.* at 544; *see Nat'l Ass'n of Coll. Bookstores v. Cambridge Univ. Press*, 990 F.Supp. 245, 250 (S.D.N.Y.1997) ("The fact that a limited amount of individuated proof may be necessary does not in itself preclude associational standing."). This reasoning finds support in *Hunt* itself, which held that an association of apple growers had standing to challenge a statute, notwithstanding the varied nature and extent of the burdens suffered by the association's members in complying with the statute. *See* 432 U.S. at 343-44, 97 S. Ct. 2434. Accordingly, we conclude that GHC and InterAction have adequately alleged associational standing.

II. Preliminary Injunctions

We review the grant of a preliminary injunction for abuse of discretion. *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 100 (2d Cir. 2008). "A district court abuses its discretion when (1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Mul-*

lins v. City of New York, 626 F.3d 47, 51 (2d Cir. 2010) (internal quotation marks omitted). Where, as here, the moving parties seek to "stay[] government action taken in the public interest pursuant to a statutory or regulatory scheme," they must establish (1) a likelihood of success on the merits, and (2) irreparable harm in the absence of an injunction. *Alleyne*, 516 F.3d at 100 (internal quotation marks omitted); *accord Lynch v. City of New York*, 589 F.3d 94, 98 (2d Cir. 2009). Ultimately, "[i]f the underlying constitutional question is close, . . . we should uphold the injunction." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 185 (2d Cir. 2010) (alteration in original) (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004)).

On appeal, Defendants challenge the district court's determination that Plaintiffs are likely to succeed on the merits. They do not contest the district court's finding of irreparable harm. We conclude that Plaintiffs have demonstrated a likelihood of success on the merits because the Policy Requirement likely violates the First Amendment by impermissibly compelling Plaintiffs to espouse the government's viewpoint on prostitution.

A. The Policy Requirement Likely Violates the First Amendment

1. Spending Clause and Unconstitutional Conditions Jurisprudence

The Spending Clause of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This provision allows Con-

gress to "condition[] [the] receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)). It is well settled that Congress is entitled to further policy goals indirectly through its spending power that it might not be able to achieve by direct regulation. *See id.* at 207, 107 S. Ct. 2793 ("[O]bjectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (internal quotation marks and citation omitted)). Congress's power under the Spending Clause is broad, as "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Id.* at 209, 107 S. Ct. 2793.

Defendants contend that because the Leadership Act is a Spending Clause enactment, and Plaintiffs are free to decline funding if they do not wish to comply with its conditions, the Policy Requirement should be subjected to only minimal scrutiny under *Dole*. But Congress's spending power, while broad, is not unlimited, and other constitutional provisions may provide an independent bar to the conditional grant of federal funds. Pursuant to this "unconstitutional conditions" doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570

(1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."). As the Supreme Court recently reiterated, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) ("FAIR") (internal quotation marks omitted).

This tension between the breadth of Congress's spending power on one hand and the principle that a condition on the receipt of federal funds may not infringe upon the recipient's First Amendment rights on the other has given rise to three seminal Supreme Court decisions and several related cases from our Circuit. The Supreme Court cases are *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), *FCC v. League of Women Voters of California*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), and *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). Our cases include a series of decisions concerning conditions imposed upon recipients of funding from the Legal Services Corporation ("LSC"): *Velazquez v. Legal Services Corp.*, 164 F.3d 757 (2d Cir. 1999) ("*Velazquez I*"), *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("*Velazquez II*"), and *Brooklyn Le-*

gal Services Corp. v. Legal Services Corp., 462 F.3d 219 (2d Cir. 2006) ("*BLS*").

In *Regan*, plaintiff Taxation With Representation ("TWR"), a nonprofit lobbying corporation, challenged a statute that denied tax deductions to organizations that engaged in "substantial lobbying." 461 U.S. at 541, 544, 103 S. Ct. 1997; *see* 26 U.S.C. § 501(c)(3). TWR argued that the prohibition against substantial lobbying by § 501(c)(3) organizations imposed an unconstitutional condition on the receipt of tax-deductible contributions. The Supreme Court disagreed, concluding that TWR remained free to receive deductible contributions to support its nonlobbying activity, and could create a separate, taxexempt affiliate under § 501(c)(4) to pursue its lobbying activity. *Id.* at 544-45, 103 S. Ct. 1997. Given that alternative, the Court concluded that Congress "ha[d] not infringed any First Amendment rights or regulated any First Amendment activity," but "simply chosen not to pay for TWR's lobbying." *Id.* at 546, 103 S. Ct. 1997. In a concurring opinion, Justice Blackmun emphasized "the saving effect of § 501(c)(4)," stating his view that " § 501(c)(3) alone" would be "constitutional-[ly] defect[ive]," but that "[a] § 501(c)(3) organization's right to speak is not infringed, because it is free to [lobby] through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities." *Id.* at 552-53, 103 S. Ct. 1997 (Blackmun, J., concurring).

The following term, the Supreme Court decided *League of Women Voters*, which involved a First Amendment challenge to a provision in the Public Broadcasting Act that prohibited stations receiving federal funds from "editorializing." 468 U.S. at 367, 104 S. Ct. 3106. The Court struck down the provision, trou-

bled by the fact that it "barred [a grantee] from using even wholly private funds to finance its editorial activity." *Id.* at 400, 104 S. Ct. 3106 (stating that "unlike the situation faced by [TWR], a [station] that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing"). The Court noted, however, that if recipients were permitted "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid under the reasoning of [*Regan*]," as the recipient "would be free, in the same way that [TWR] was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Id.*

The Supreme Court elaborated on these themes in *Rust*, which involved a facial challenge to HHS regulations implementing Title X of the Public Health Service Act. 500 U.S. at 177-78, 111 S. Ct. 1759. Title X authorizes HHS to make grants to organizations to help them run "family planning projects," but provides that no Title X funds "shall be used in programs where abortion is a method of family planning." *Id.* at 178, 111 S. Ct. 1759 (quoting 42 U.S.C. §§ 300(a), 300a-6). The HHS regulations prohibited Title X projects from providing abortion counseling or referrals, or engaging in any activities that encourage, promote, or advocate abortion as a method of family planning. *Id.* at 179-80, 111 S. Ct. 1759. However, the regulations allowed grantees to engage in abortion-related activities as long as their Title X projects maintained "objective integrity and independence" from such activities—a determination to be made

by HHS based on factors such as the existence of separate personnel, and the degree of separation between the Title X project and facilities used for restricted activities. *Id.* at 180-81, 111 S. Ct. 1759 (quoting 42 C.F.R. § 59.9 (1989)). The *Rust* plaintiffs argued that the regulations violated the First Amendment because they "discriminat[ed] based on viewpoint [by] prohibit[ing] all discussion about abortion as a lawful option," and because they conditioned the receipt of Title X funds on relinquishing the right to engage in abortion- related speech. *Id.* at 192, 196, 111 S. Ct. 1759 (internal quotation marks omitted).

The Supreme Court disagreed, concluding that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* at 193, 111 S. Ct. 1759 ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). It held that the regulations "do not force the Title X grantee to give up abortion-related speech," but "merely require that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196, 111 S. Ct. 1759. The Court emphasized that this was unlike the funding condition found unconstitutional in *League of Women Voters*, where "the Government ha[d] placed [the] condition on the *recipient* of the subsidy rather than on a particular program or service." *Id.* at 197, 111 S. Ct. 1759 (emphasis in original).

We turn now to three decisions of this Court arising under the Legal Services Corporation Act of 1974, pur-

suant to which the LSC makes grants to local organizations that provide free legal assistance to indigent clients. *Velazquez I*, 164 F.3d at 759. In 1996, Congress passed legislation barring LSC grants to entities that engage in certain activities, such as lobbying or class actions, thereby "restrict[ing] grantees' use of non-federal and federal funds alike." *Id.* at 760. In order to cure the "constitutional infirmities" of the 1996 restrictions, LSC issued "program integrity" regulations, modeled after those upheld in *Rust*, allowing grantees to affiliate with organizations that did engage in prohibited activities, as long as the entities maintained adequate physical and financial separation. *Id.* at 761-62.

In *Velazquez I*, we considered a facial challenge to the 1996 statute and LSC regulations, which the plaintiffs argued "impermissibly burden[ed] grantees' exercise of First Amendment activities," and "constitut[ed] a viewpoint-based restriction on expression." *Id.* at 763. Judge Leval, writing for the majority, synthesized *Regan*, *League of Women Voters*, and *Rust* as establishing "that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Id.* at 766. The facial challenge therefore failed, because although the affiliate option might, as applied to some LSC grantees, prove unduly burdensome, there was no reason to think this would be true for all grantees. *Id.* at 767. However, one provision in the 1996 statute, which prohibited grantees from representing clients challenging existing welfare law, was held invalid as impermissible viewpoint discrimination. *Id.* at 769-72.

The Supreme Court affirmed our invalidation of that viewpoint-based restriction in *Velazquez II*. 531 U.S. at 540-41, 121 S. Ct. 1043. The Court interpreted *Rust* as having implicitly "reli[ed] on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech," explaining that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government use[s] private speakers to transmit information pertaining to its own program." *Id.* at 541, 121 S. Ct. 1043 (internal quotation marks and citation omitted). The *Velazquez II* Court held, however, that the LSC program, unlike Title X, was not "designed . . . to promote a governmental message," as an LSC-funded lawyer "is not the government's speaker," but rather "speaks on the behalf of his or her private, indigent client." *Id.* at 542, 121 S. Ct. 1043. Therefore, *Rust* did not save the viewpoint-based restriction on seeking welfare reform. The Court declined to review the portion of *Velazquez I* that had upheld the LSC's program integrity regulations. 532 U.S. 903, 121 S. Ct. 1224, 149 L. Ed. 2d 135 (2001) (Mem.) (denying certiorari).

Following *Velazquez II*, the *Velazquez* plaintiffs brought an as-applied challenge to the LSC regulations. *BLS*, 462 F.3d at 224. The district court enjoined application of the regulations, reasoning that they imposed an "undue burden" on the plaintiffs' First Amendment rights, as LSC's interest in program integrity could be fulfilled by "means less restrictive." *Id.* at 222, 229. On appeal, we held that the district court's application of an undue burden/less-restrictive-means test to the regulations was error, reiterating the standard articulated in

Velazquez I—that grantees' First Amendment rights may be burdened if they are left with "adequate alternative channels" for protected expression. *Id.* at 229-31. We therefore remanded for the district court to evaluate the program integrity regulations under that standard.

2. The Policy Requirement Warrants Heightened Scrutiny

Applying these cases to the one before us, we conclude that the Policy Requirement, as implemented by the Agencies, falls well beyond what the Supreme Court and this Court have upheld as permissible funding conditions. Unlike the funding conditions in the cases discussed above, the Policy Requirement does not merely restrict recipients from engaging in certain expression (such as lobbying (*Regan*), editorializing (*League of Women Voters*), abortion-related speech (*Rust*), or welfare reform litigation (the LSC cases)), but pushes considerably further and mandates that recipients affirmatively *say* something—that they are "opposed to the practice[ ] of prostitution," 45 C.F.R. § 89.1. The Policy Requirement is viewpoint-based, and it compels recipients, as a condition of funding, to espouse the government's position.

Compelling speech as a condition of receiving a government benefit cannot be squared with the First Amendment. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714-17, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (finding unconstitutional requirement that drivers, as condition of using the roads, display state motto "Live Free or Die" on license plates); *Speiser v. Randall*, 357 U.S. 513, 518-19, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (finding unconstitutional requirement that veterans, as con-

dition of receiving property tax exemption, declare that they do not advocate the forcible overthrow of government); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (finding unconstitutional requirement that schoolchildren, as condition of going to school, salute the flag; stating that such "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence").

Here, much as in *Wooley*, *Speiser*, and *Barnette*, silence, or neutrality, is not an option for Plaintiffs. In order to avoid losing Leadership Act funding, they must declare their opposition to prostitution. As Defendants correctly point out, these traditional "compelled speech" cases involved already-existing public benefits, not government funding programs, and are therefore distinguishable in that respect. But these cases teach that where, as here, the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns.[3] The Supreme

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[3] The dissent devotes considerable energy to the effort of showing that *Wooley*, *Speiser*, and *Barnette* do not control this case. We do not suggest that they do. Indeed, as the dissent acknowledges, we expressly recognize that these compelled speech cases are distinguishable. But we do draw from them the underlying principle that the First Amendment does not look fondly on attempts by the government to affirmatively require speech. In doing so, we do not "put[] . . . aside" the unconstitutional conditions doctrine, Dissent at 255, but rather realize that although *Regan* and its progeny unquestionably provide the framework for our analysis, they do not capture the Policy Requirement as neatly as the dissent suggests. The dissent asserts that "[n]one of those [unconstitutional conditions] cases turned on whether the alleged speech restriction was affirmative or negative," Dissent at 257, but that is easy to say when none of those cases *involved* an affirmative speech restriction. It is partly because the Policy Requirement is just such a restric-

Court recently implied as much in *FAIR*, where it upheld the Solomon Amendment's requirement that universities permit military recruiters on campus as a condition of receiving federal funding. The Court noted that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." 547 U.S. at 61-62, 126 S. Ct. 1297. The Policy Requirement calls for exactly that.

The Policy Requirement is also viewpoint-based, because it requires recipients to take the government's side on a particular issue. It is well established that viewpoint-based intrusions on free speech offend the First Amendment. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (stating "broad[] principle [that] [r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment" (internal quotation marks omitted)).

Although viewpoint-based funding conditions that target speech are not necessarily unconstitutional, *see Rust*, 500 U.S. 173, 111 S. Ct. 1759, such conditions are constitutionally troublesome. In *Regan*, for example, the Court applied minimal scrutiny in reviewing a condition that was, unlike the Policy Requirement, decidedly

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tion that it pushes beyond the restrictions upheld in *Regan*, *Rust*, and the LSC cases, and that we conclude Plaintiffs are likely to succeed in demonstrating that it is an unconstitutional condition.

viewpoint-*neutral* (it banned *all* lobbying by § 501(c)(3) organizations, regardless of the nature of the legislation or the organization's position on it). *See* 461 U.S. at 541, 548, 103 S. Ct. 1997. In *League of Women Voters*, which invalidated a viewpoint-neutral restriction on "editorializing," all four dissenting Justices indicated that if the restriction *were* viewpoint-based, they too would find it constitutionally problematic. *See* 468 U.S. at 407-08, 104 S. Ct. 3106 (Rehnquist, J., dissenting) (emphasizing that condition was "strictly neutral," not directed at "editorial views of one particular ideological bent"); *id.* at 413, 104 S. Ct. 3106 (Stevens, J., dissenting) ("[O]f greatest significance for me, the statutory restriction is completely neutral in its operation—it prohibits all editorials without any distinction being drawn concerning . . . the point of view that might be expressed."); *cf. Rosenberger*, 515 U.S. at 829, 115 S. Ct. 2510 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

The LSC cases confirm this conclusion. In *Velazquez I*, we invalidated as viewpoint-discriminatory a restriction prohibiting LSC grantees from representing clients seeking welfare reform. 164 F.3d at 769-72. The Supreme Court affirmed, concluding that *Rust* could not justify the restriction because although, as *Rust* had implicitly established, "viewpoint-based funding decisions can be sustained in instances in which . . . the government use[s] private speakers to transmit information pertaining to its own program," the LSC grantees were not speaking on behalf of the government. *Velazquez II*, 531 U.S. at 540-42, 121 S. Ct. 1043 (internal quotation marks omitted). Finally, in *BLS*, while we re-

manded for the district court to apply the "adequate alternative channels" test to the LSC's viewpoint-neutral program integrity regulations, we expressly recognized, citing *Velazquez I*, that "substantive restrictions that are directed toward speech as such" might require "closer attention"—an issue that "[went] to the . . . statutory restrictions challenged in [the LSC] cases." *See BLS*, 462 F.3d at 230. The Policy Requirement is substantive, viewpoint-based, and "directed toward speech," as it affirmatively requires recipients *to speak*. It is this bold combination in a funding condition of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based that warrants heightened scrutiny.

Furthermore, the targeted speech, concerning prostitution in the context of the international HIV/AIDS-prevention effort, is a subject of international debate. The right to communicate freely on such matters of public concern lies at the heart of the First Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) ("[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." (internal quotation marks omitted)). The Policy Requirement offends that principle, mandating that Plaintiffs affirmatively espouse the government's position on a contested public issue where the differences are both real and substantive. For example, the World Health Organization ("WHO") and the Joint United Nations Programme on HIV/AIDS ("UNAIDS") have recognized advocating for the reduction of penalties for prostitution—to prevent such penalties from interfering with outreach efforts—as among the *best* practices for HIV/

AIDS prevention.[4] Plaintiffs claim that being forced to declare their opposition to prostitution "harms [their] credibility and integrity as NGOs, which generally avoid taking controversial policy positions likely to offend host nations [and] partner organizations," and risks "offending all of the[] groups whose approach to HIV/AIDS may differ from that of the government," not to mention some of the very people, prostitutes, "whose trust they must earn to stop the spread of HIV/AIDS." Appellees' Br. 11-12.

3. *Rust* and the Government—Speech Doctrine

In defending the Policy Requirement's viewpoint-based speech mandate, the Agencies turn to *Rust*, which upheld a viewpoint-based prohibition on abortion counseling. Since *Rust*, the Supreme Court has "explained" that decision as having implicitly relied upon a "government speech" principle, stating that: "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government use[s] private speakers to transmit information pertaining to its own program." *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 (internal quotation marks and citation omitted). This is because "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833, 115 S. Ct.

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[4] The dissent declines to comment on the type of speech at issue, and asserts that "the substantive validity" of Plaintiffs' position on prostitution is "not determinative of whether the Policy Requirement is constitutional." Dissent at 266. But we do not suggest that the *validity* of Plaintiffs' position on the proper approach to prostitution is relevant; rather, it is the fact that the targeted speech concerns a controversial public issue that is constitutionally significant.

2510 ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."). Therefore, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Id.*

According to the Agencies, this case is, like *Rust*, a government-speech case because in enacting the Leadership Act, Congress "sought to advance to the greatest extent possible its message opposing prostitution," "chose to enlist the recipients of Leadership Act funding to disseminate its message," and, "to ensure that the message was conveyed effectively, . . . required that those recipients have [an antiprostitution] policy." Appellants' Br. 32; *see DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758, 761-63 (D.C. Cir. 2007) (upholding Policy Requirement). We are not persuaded.

The Policy Requirement goes well beyond the funding condition upheld in *Rust* because it compels Plaintiffs to voice the government's viewpoint and to do so as if it were their own. Indeed, the *Rust* Court expressly observed that "[n]othing in [the challenged regulations] *requires a doctor to represent as his own any opinion that he does not in fact hold.*" 500 U.S. at 200, 111 S. Ct. 1759 (emphasis added). Rather, the grantee's staff could remain "silen[t] with regard to abortion," and, if asked about abortion, was "free to make clear that advice regarding abortion is simply beyond the scope of

the program." *Id.*[5] Here, on the other hand, Plaintiffs do not have the option of remaining silent or neutral. Instead, they must represent as their own an opinion—that they affirmatively oppose prostitution—that they might not categorically hold. Suffice it to say that *Rust* would have been a very different case had the government gone as far as requiring Title X recipients to affirmatively adopt a policy statement opposing abortion, in the way the Leadership Act mandates the adoption of a policy statement opposing prostitution. The government has, by compelling NGOs to affirmatively pledge their opposition to prostitution, stepped beyond what might have been appropriate to ensure that its anti-prostitution message would not be "garbled" or "distorted," *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510.

We do not mean to imply that the government may never require affirmative, viewpoint-specific speech as a condition of participating in a federal program. To use an example supplied by Defendants, if the government were to fund a campaign urging children to "Just Say No" to drugs, we do not doubt that it could require grantees to state that they oppose drug use by children. But in that scenario, the government's program *is*, in effect, its message. That is not so here. The stated purpose of the Leadership Act is to *fight HIV/AIDS*, as well as tuberculosis, and malaria.[6] Defendants cannot now

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[5] The *Rust* Court made these observations in the course of addressing the plaintiffs' claim that the regulations violated the First Amendment rights of the grantee's staff, a claim the Court stated was governed by the "same principles" as the claim that the regulations violated the First Amendment rights of the grantee. 500 U.S. at 198, 111 S. Ct. 1759.

[6] The dissent's counter-hypothetical, involving "potential grantees who do not actually oppose drug use by children, but are tempted by

recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign. *Cf. Velazquez II*, 531 U.S. at 547, 121 S. Ct. 1043 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). If the government-speech principle allowed Congress to compel funding recipients to affirmatively espouse its viewpoint on every subsidiary issue subsumed within a federal spending program, the exception would swallow the rule.

Defendants assert that advocating against prostitution is indeed "central" to the Leadership Act program, Appellants' Br. 32, but it is difficult to reconcile that assertion with what the Act does. As we have seen, the Policy Requirement expressly exempts three organizations and all U.N. agencies from having to comply with it. 22 U.S.C. § 7631(f) ("[T]his subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency."). As previously noted, the WHO and UNAIDS have taken a public position at odds with the Policy Requirement, recognizing the reduction of penalties for prostitution as a best practice in the fight against HIV/AIDS. Defendants attempt to distinguish these

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the offer of funds," Dissent at 264, misses the point. Our analysis does not turn on whether individual grantees actually disagree with the government-mandated speech, but rather on the nature of the program. We use the phrase "do so as if it were their own," *supra* at 237, simply to highlight the invasiveness of a condition that requires a recipient to affirmatively represent to the world that it, as an independent, nongovernmental entity, holds an opinion—the government's opinion—that it may or may not in fact hold.

exempted recipients on the ground that they are "public international organizations," such that forcing them to adopt an antiprostitution policy would require "multilateral negotiations." Appellants' Br. 58. But if anti-prostitution advocacy were central to the government's program, it could, of course, simply choose not to fund these organizations. In short, the Agencies' suggestion that requiring Plaintiffs to adopt an anti-prostitution policy statement is integral to the Leadership Act program is undermined by the fact that the government has chosen to fund high-profile, global organizations that remain free to express—and indeed openly express—a contrary policy, or no policy at all.[7]

Nor are we persuaded by the Agencies' argument that the Policy Requirement is entitled to "leeway" because it implicates "foreign affairs." Appellants' Br. 34-35. While mindful of the government's strong interest in managing international relations, we agree with the district court that this interest, in this case, does not warrant the deference that the Agencies request. *See Alliance I*, 430 F. Supp. 2d at 265-67. The Agencies' reliance on *DKT Memorial Fund Ltd. v. Agency for International Development*, 887 F.2d 275 (D.C. Cir. 1989), is misplaced, as that case centered around a restriction on the First Amendment activities of *foreign* NGOs receiving U.S. government funds. The challenge here is to the impact of the Policy Requirement on *domestic* NGOs. Indeed, the Agencies have applied the

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[7] Contrary to the dissent's suggestion, we do not make any "policy judgment" in connection with Congress's decision to exempt these organizations. Dissent at 266. We simply note that § 7631(f)'s exemption clause undercuts the Agencies' assertion that the adoption of an anti-prostitution policy is central to the Leadership Act program.

Policy Requirement to foreign organizations since its inception, without challenge. This litigation arose only after the government reversed course and began also applying the Requirement to U.S.- based organizations like AOSI and Pathfinder. The Policy Requirement compels domestic NGOs to adopt a policy statement on a particular issue, and prohibits them from engaging in certain expression at, for example, conferences and forums throughout the United States. These factors convince us that the speech is far more of a domestic than a foreign concern.

4. The Guidelines

Finally, the Agencies contend that any compelled-speech type problems in the Policy Requirement are successfully addressed by the Guidelines because any entity unwilling to state its opposition to prostitution can form an affiliate that does so. As a consequence, the Agencies assert, the parent organization is not compelled to speak any message at all. But this assertion fails to confront the fact that whether the recipient is a parent or an affiliate, it is required to affirmatively speak the government's viewpoint on prostitution. The "adequate alternative channels for protected expression" test, which is predicated on the rationale that limitations on speech are permissible if grantees can express their opinions elsewhere, does not provide the proper framework for evaluating the Policy Requirement's speech mandate. The curative function of an "adequate alternative channel" is to alleviate the burden of a constraint on speech by providing an *outlet* that allows an organization to engage—through the use of an affiliate—in the privately funded expression that otherwise would have been impermissibly prohibited by the

federal program. For example, in *Regan*, a § 501(c)(3) organization's ability to form a § 501(c)(4) affiliate freed it to engage in privately funded lobbying, and, in *League of Women Voters*, the funding restriction would have been saved if the recipient stations had been allowed to form affiliates to engage in privately funded editorializing. It simply does not make sense to conceive of the Guidelines here as somehow addressing the Policy Requirement's affirmative speech requirement by affording an outlet to engage in privately funded *silence*; in other words, by providing an outlet to do nothing at all. It may very well be that the Guidelines afford Plaintiffs an adequate outlet for expressing their opinions on prostitution, but there remains, on top of that, the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution. As the district court aptly stated, "[w]hile the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution, the clause requiring Plaintiffs to adopt the Government's view regarding . . . prostitution remains intact." *Alliance III*, 570 F. Supp. 2d at 545. The Guidelines, by their very nature, do not account for that requirement.

For the reasons set forth above, we conclude that Plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment challenge. Because the Policy Requirement compels grantees to espouse the government's position on a controversial issue, the district court did not abuse its discretion in preliminarily enjoining its enforcement pending a trial on the merits.[8]

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[8] Because we affirm on this ground, we, like the district court, do not reach Plaintiffs' argument that the Policy Requirement, as imple-

CONCLUSION

The district court's grant of preliminary injunctive relief is AFFIRMED.

STRAUB, Circuit Judge, dissenting:

The majority today holds that the Policy Requirement "falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds." Maj. Op. at 223. On the contrary, the Policy Requirement, together with the Guidelines implemented by Defendants, is precisely in line with the "unconstitutional conditions" doctrine as it has been applied in the context of subsidy conditions alleged to violate the First Amendment. The Policy Requirement neither imposes a coercive penalty on protected First Amendment rights nor discriminates in a way aimed at the suppression of any ideas. Furthermore, the viewpoint-based nature of the Policy Requirement is entirely proper because the Leadership Act does not implicate public-forum principles, but rather allows the government to subsidize the transmittal of a mes-

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mented by the Agencies, is unconstitutionally vague with respect to what sorts of speech are prohibited as "inconsistent with [an] opposition to the practice[] of prostitution." 45 C.F.R. § 89.3. Plaintiffs contend that because the Agencies have not promulgated any guidance regarding the kinds of speech and activities that will be deemed insufficiently opposed to prostitution, it is unclear in what prostitution-related expression grantees may, and may not, engage. Plaintiffs point out that the restrictions on speech at issue in the LSC cases, the cases on which the Agencies have attempted to model the instant regime, were substantially more specific than the Policy Requirement is here. Indeed, oral argument left us with the distinct impression that not even Defendants have a grasp on what it means to engage in expression that is "inconsistent" with an opposition to prostitution.

sage it has concluded is part of its preferred method of fighting HIV/AIDS. Therefore, heightened scrutiny is not proper in this case. Because the Policy Requirement is an entirely rational exercise of Congress's powers pursuant to the Spending Clause and because Plaintiffs have not shown that they are likely to succeed on the merits of their claim that the Policy Requirement is unconstitutional, I would vacate the District Court's grant of a preliminary injunction. Accordingly, I respectfully dissent.

I

A further explanation of the Leadership Act may be helpful in understanding the purpose of the funding restriction at issue here. In 2003, Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, Pub. L. No. 108-25, 117 Stat. 711 (codified as amended at 22 U.S.C. § 7601 *et seq.*). The Act was reauthorized and amended in 2008. *See* 22 U.S.C. § 7671; Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, 122 Stat. 2918 (codified at 22 U.S.C. § 7601 *et seq.*). The current version of the Act directs the President to "establish a comprehensive, integrated, 5-year strategy to expand and improve efforts to combat global HIV/AIDS," 22 U.S.C. § 7611(a), and provides $48 billion of taxpayer funds to fight the epidemic over five years, *id.* § 7671(a). The Act provides that this strategy shall "make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by," among other means, "promoting abstinence from sexual activity and encouraging monogamy and faithfulness," "educating men and boys about the risks of procuring sex commer-

cially and about the need to end violent behavior toward women and girls," "supporting partner country and community efforts to identify and address social, economic, or cultural factors, such as . . . gender-based violence [and] lack of empowerment for women . . . , which directly contribute to the transmission of HIV," "promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes," and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." *Id.* § 7611(a)(12)(A), (F)-(G), (I)-(J). Congress explicitly found that

> [p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic.

Id. § 7601(23).

In light of its goal to provide funding for "private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS," *id.* § 7603(4), and its strategy of doing so, in part, by "encouraging monogamy and faithfulness," "educating men and boys about the risks of procuring sex commercially," and "working to eliminate . . . the sexual exploitation of women and children," *id.* § 7611(a)(12)(A), (F), (J), Congress imposed two conditions on Leadership Act funds that are relevant to this case. First, Congress provided that no funds "may be used to promote or advocate the legaliza-

tion or practice of prostitution or sex trafficking." *Id.* § 7631(e). Second, Congress provided that

> [n]o funds . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

Id. § 7631(f) ("Policy Requirement"). In this way, Congress ensured not only that no Leadership Act funds would be used to promote prostitution, but also that its "funds go only to organizations that share the Act's disapproval of prostitution and sex trafficking." *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758, 760 (D.C. Cir. 2007).

Defendants the United States Department of Health and Human Services ("HHS") and the United States Agency for International Development ("USAID") ("Agencies") implemented the Policy Requirement by promulgating certain regulations and directives. The current rules require that Leadership Act recipients agree in public announcements of the receipt of funds, and in funding award documents, "that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." HHS Organizational Integrity of Entities Implementing Programs & Activities Under the Leadership Act, 45 C.F.R. § 89.1 (2010); *see also* U.S. Agency for Int'l Dev., AAPD 05-04 Amendment 3, Implementation of the [eadership Act]—

Eligibility Limitation on the Use of Funds & Opposition to Prostitution & Sex Trafficking ¶ 2(A)(1), Attachment A (2010) [hereinafter USAID APPD]. The Agencies also promulgated organizational integrity guidelines and guidance ("Guidelines"), which allow a recipient of Leadership Act funds to maintain an affiliation with an organization that lacks the anti-prostitution policy required by 22 U.S.C. § 7631(f). The Guidelines require the recipient to "have objective integrity and independence" from any affiliate that "engages in activities inconsistent with the recipient's opposition to . . . prostitution." 45 C.F.R. § 89.3; *see also* USAID APPD ¶ 4(B). "Objective integrity and independence" will be found if the affiliate receives no transfer of Leadership Act funds from the recipient and the recipient "is, to the extent practicable in the circumstances, separate from the affiliated organization." 45 C.F.R. § 89.3(a)-(b); *see also* USAID APPD ¶ 4(B). "[S]ufficient separation" will be determined "on a case-by-case basis . . . based on the totality of the facts," including by examining five non-exclusive factors. 45 C.F.R. § 89.3(b); *see also* USAID APPD ¶ 4(B). The factors listed are: (1) legal separation of the affiliate, (2) "[t]he existence of separate personnel," (3) "[t]he existence of separate accounting and timekeeping records," (4) "[t]he degree of separation of . . . facilities," and (5) "[t]he extent to which signs and other forms of identification that distinguish the recipient from the affiliated organization are present." 45 C.F.R. § 89.3(b)(1)-(5); *see also* USAID APPD ¶ 4(B).

II

Plaintiffs' challenges to the Policy Requirement in this case are grounded in two substantive restrictions on government conduct imposed by the First Amendment:

the prohibition against compelled speech and the prohibition against viewpoint discrimination. Because the Policy Requirement is not a direct restriction on speech, but rather only a condition on the receipt of a federal subsidy, I analyze Plaintiffs' First Amendment challenges through the prism of the "unconstitutional conditions" doctrine as it has been applied in the government subsidy context. As background, I first discuss the underlying First Amendment substantive restrictions at issue and then the development of the "unconstitutional conditions" doctrine in the context of government subsidies.

A

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. There is no question that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977); *see also Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996) (discussing constitutional right not to speak). In fact, the Supreme Court has suggested, without holding, that the government may be required to assert an even more compelling interest when it infringes the right to refrain from speaking than is required when it infringes the right to speak. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) ("It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."). The Supreme Court has struck down govern-

ment attempts to directly compel school children to recite the Pledge of Allegiance on pain of expulsion from public school, *see id.* at 629, 63 S. Ct. 1178, or to compel drivers to bear a state's motto on their license plates on pain of a monetary fine, *see Wooley*, 430 U.S. at 714-17, 97 S. Ct. 1428. The Court also has invalidated a state's attempt to indirectly compel speech through the denial of an independent, already-existing tax exemption. *See Speiser v. Randall*, 357 U.S. 513, 518-19, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

The First Amendment also prohibits the government from directly regulating "speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Id.* "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* Viewpoint-based restrictions "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991). "The First Amendment presumptively places this sort of discrimination beyond the power of the government." *Id.*

B

When the government does not directly regulate speech, but only implicates First Amendment interests through conditions on federal spending, a different framework applies. The Spending Clause of the United States Constitution provides that "Congress shall have

Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This provision allows Congress not only to provide federal subsidies to advance its policy goals, but also to "attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). Congress "has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Id.* (internal quotation marks omitted). For constitutional purposes, a federal subsidy program is fundamentally different from "direct state interference" with a particular activity. *See Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977). "Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Id.* at 476, 97 S. Ct. 2376. As a result, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998). Subsidy conditions, absent special circumstances, "cannot be subject to the least- or less-restrictive means mode of analysis—which, like the undue burden test . . . , is more appropriate for assessing the government's direct regulation of a fundamental right—when the government creates a federal spending program." *Brooklyn Legal Servs. v. Legal Servs. Corp.*, 462 F.3d 219, 229 (2d Cir.

2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007).

The government's power to impose conditions on federal subsidies is not unlimited. The "unconstitutional conditions" doctrine provides, in the First Amendment context, that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (internal quotation marks omitted) [hereinafter *FAIR*]; *see Perry v. Sindermann*, 408 U.S. 593, 597-98, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (reaffirming that the government may not terminate an employee based on the exercise of First Amendment rights because "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited"). The "unconstitutional conditions" doctrine does not, however, give rise to a constitutional claim in its own right; the condition must actually cause a violation of a substantive First Amendment right. *See FAIR*, 547 U.S. at 59-60, 126 S. Ct. 1297 (declining to address unconstitutional conditions issue because no underlying constitutional violation would arise from direct restriction); *cf.* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1427 (1989) (explaining that "constitutional interest at issue must rise to the level of a recognized right—indeed, a *preferred* right normally protected by strict judicial review"). The purpose of the "unconstitutional conditions" doctrine in the government subsidy context, therefore, is to provide

guidance on when a subsidy condition actually "infringes [a person's] . . . constitutionally protected . . . freedom of speech," *FAIR*, 547 U.S. at 59, 126 S. Ct. 1297. *See Regan v. Taxation With Representation*, 461 U.S. 540, 548, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) (explaining that heightened scrutiny is not required of all conditions on government funding or tax exemptions that merely "'*affect* [ ] First Amendment rights'" (quoting *Taxation With Representation v. Regan*, 676 F.2d 715, 728 (D.C. Cir. 1982)) (emphasis added in Supreme Court opinion)); *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332 (noting that the denial of a tax exemption "may . . . infringe speech").

The "unconstitutional conditions" doctrine was applied in the context of a First Amendment challenge to the denial of a government benefit in *Speiser*. In that case, the State of California attempted to require veterans otherwise eligible for a property tax exemption to sign a loyalty oath stating that they did not advocate the violent overthrow of the government. The Supreme Court first observed that "[i]t is settled that speech can be effectively limited by the exercise of the taxing power. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332 (citation omitted). Therefore, the Court concluded that the fact that "a tax exemption is a 'privilege' or 'bounty'" does not mean that "its denial may not infringe speech." *Id.* at 518, 78 S. Ct. 1332. The Court explained that in *Speiser*, "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from

the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'" *Id.* at 519, 78 S. Ct. 1332 (quoting *Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402, 70 S. Ct. 674, 94 L. Ed. 925 (1950)). Having characterized the condition as tantamount to a fine, the Court struck it down pursuant to the Due Process Clause of the Fourteenth Amendment for lacking sufficient procedural protections. *Id.* at 520-29, 78 S. Ct. 1332.

In *Taxation With Representation*, the Supreme Court was called on to apply *Speiser* in the context of a condition on nonprofit groups' ability to retain tax-favored status. Specifically, the Court addressed whether Congress's prohibition on lobbying by nonprofit organizations that were allowed to receive tax-deductible contributions amounted to an unconstitutional condition on the organizations' ability to receive tax-deductible money. *See Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997. While lobbying is clearly protected by the First Amendment, *see E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), the Court disagreed with the argument that the government had violated nonprofit groups' First Amendment rights by declining to "pay for the lobbying out of public monies," *Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997. The Court "reject[ed] the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'" *Id.* at 546, 103 S. Ct. 1997 (quoting *Cammarano v. United States*, 358 U.S. 498, 515, 79 S. Ct. 524, 3 L. Ed. 2d 462 (1959) (Douglas, J., concurring)). The Court reasoned that the condition was valid because Congress did "not deny [plaintiff Taxation

With Representation ("TWR")] the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby." *Id.* Congress had not denied TWR the right to receive tax-deductible contributions to support non-lobbying activities because, despite Congress's restriction, the law allowed TWR to use a dual structure whereby TWR could continue to receive tax-deductible contributions to conduct non-lobbying activities while an affiliate organization could conduct any lobbying activities with non-deductible funds. *Id.* at 544, 103 S. Ct. 1997. The Supreme Court explained that, therefore, "Congress has not infringed any First Amendment rights or regulated any First Amendment activity[;] Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 546, 103 S. Ct. 1997.

The Supreme Court also rejected the claim that Congress had violated TWR's constitutional rights by continuing to allow tax-exempt veterans' organizations to lobby with tax-deductible contributions. *Id.* at 546-47, 103 S. Ct. 1997. Congress was free to "select[] . . . particular entities or persons for entitlement to this sort of largesse [because the decision wa]s obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find." *Id.* at 549, 103 S. Ct. 1997 (internal quotation marks omitted). The Court cautioned, however, that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way 'to aim at the suppression of dangerous ideas.'" *Id.* at 548, 103 S. Ct. 1997 (some internal quotation marks omitted) (quoting *Cammarano*, 358 U.S. at 513, 79 S. Ct. 524, in turn quoting *Speiser*, 357 U.S. at 519, 78 S. Ct. 1332).

The Court found "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Id.* It also explicitly rejected the holding of the Court of Appeals below that "'strict scrutiny' is required because the statute '*affect[s]* First Amendment rights on a discriminatory basis.'" *Taxation With Representation*, 461 U.S. at 548, 103 S. Ct. 1997 (quoting *Taxation With Representation v. Regan*, 676 F.2d 715, 728 (D.C. Cir. 1982)) (alteration and emphasis added in Supreme Court opinion). The Supreme Court explained that it "is not the law" that "strict scrutiny applies whenever Congress subsidizes some speech, but not all speech." *Id.* Rather, "appropriations are comparable to tax exemptions and deductions, which are also a matter of grace [that] Congress can, of course, disallow . . . as it chooses." *Id.* at 549, 103 S. Ct. 1997 (internal quotation marks omitted). The Court emphasized again that "[w]here governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'" *Id.* at 550, 103 S. Ct. 1997 (quoting *Cammarano*, 358 U.S. at 513, 79 S. Ct. 524, and *Maher*, 432 U.S. at 476, 97 S. Ct. 2376, respectively).

In a concurrence, Justice Blackmun, joined by Justices Brennan and Marshall, pointed out that Congress had in reality "not merely den[ied] a subsidy for lobbying activities" as the Court had suggested, it had prohibited an organization from receiving "tax-deductible contributions for all its activities, whenever one of those activities is 'substantial lobbying.'" *Id.* at 552, 103 S. Ct. 1997 (Blackmun, J., concurring). Justice Blackmun therefore urged that this restriction would in fact

"den[y] a significant benefit to organizations choosing to exercise their constitutional rights" and, as a result, would be an unconstitutional condition. *Id.* at 552 & n.*, 103 S. Ct. 1997. As support for this conclusion, Justice Blackmun cited, among other opinions, Justice Douglas's concurrence in *Cammarano*, which noted that while Congress's denial of a business-expense deduction for lobbying activities was constitutional, the denial of all business deductions for a taxpayer who lobbied, "would be placing a penalty on the exercise of First Amendment rights," *Cammarano*, 358 U.S. at 515, 79 S. Ct. 524 (Douglas, J., concurring) (cited in *Taxation With Representation*, 461 U.S. at 552 n.*, 103 S. Ct. 1997 (Blackmun, J., concurring)). Justice Blackmun's *Taxation With Representation* concurrence went on to explain that the lobbying restriction in that case was saved by the fact that a nonprofit organization could create an affiliate to "make known its views on legislation . . . without losing tax benefits for its nonlobbying activities." *Taxation With Representation*, 461 U.S. at 553, 103 S. Ct. 1997. Because of this dual structure, Justice Blackmun explained that "the Court finds that Congress' purpose in imposing the lobbying restriction was merely to ensure that 'no tax-deductible contributions are used to pay for substantial lobbying.'" *Id.* at 553, 103 S. Ct. 1997.

Taxation With Representation therefore expanded in two ways on *Speiser*'s initial discussion of the "unconstitutional conditions" doctrine as it applies to conditions on government benefits or subsidies that affect First Amendment rights. First, the Court noted that a funding condition would be unconstitutional if it operated as a coercive penalty on the exercise of First Amendment

rights. The Court suggested two ways that a government condition could do this: (1) if it restricted a recipient's First Amendment speech outside of the scope of the recipient's participation in the government program (for example, by restricting TWR from lobbying even with non-deductible contributions), or (2) if it denied government benefits to which the recipient would otherwise be entitled and that are independent from those provided by the government program at issue (for example, by denying a property tax exemption for failure to take a loyalty oath). *See id.* at 545, 103 S. Ct. 1997. Second, *Taxation With Representation* cautioned that when the purpose of a condition is not to define the boundaries of federal spending, but rather to suppress certain viewpoints, the condition may be unconstitutional. *See id.* at 548, 103 S. Ct. 1997. It is either as a coercive penalty or as viewpoint suppression, then, that the denial of a government benefit may "infringe [a person's] constitutionally protected ... freedom of speech even if he has no entitlement to that benefit," *FAIR*, 547 U.S. at 59, 126 S. Ct. 1297 (internal quotation marks omitted).

In the following two sections, I first address cases analyzing funding conditions as penalties on speech and then turn to cases discussing funding conditions alleged to impermissibly discriminate on the basis of viewpoint.

1

The term following its *Taxation With Representation* decision, the Supreme Court decided *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), which underlined the importance of the affiliate structure available in *Taxation With Representation*. In *League of Women Voters*, the Supreme

Court ruled that Congress's prohibition on editorializing by any noncommercial broadcast station that received a federal grant was not "sufficiently limited . . . to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects." *Id.* at 402, 104 S. Ct. 3106. By denying federal grants to stations that editorialized, Congress had not merely refused to subsidize editorializing by public broadcasting stations, but rather it had caused a "station that receives only 1% of its overall income from [federal] grants [to be] barred absolutely from all editorializing." *Id.* at 400, 104 S. Ct. 3106. "The station ha[d] no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it [wa]s barred from using even wholly private funds to finance its editorial activity." *Id.* The Court explicitly noted, however, that if Congress maintained the restriction but allowed broadcast stations to establish affiliate organizations to editorialize with nonfederal money, "such a statutory mechanism would plainly be valid under the reasoning of *Taxation With Representation.*" *Id.* The Court in *League of Women Voters*, therefore, as both the *Taxation With Representation* Court, 461 U.S. at 544-46, 103 S. Ct. 1997, and Justice Blackmun concurring in that case, *id.* at 552-53, 103 S. Ct. 1997, had suggested, concluded that a federal funding condition that not only limited the scope of the government program, but that also denied a recipient the right to spend private money in support of protected First Amendment activities, went too far.

In *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), the Supreme Court applied the "unconstitutional conditions" doctrine in the context of

a subsidy program that appropriated grants to healthcare organizations to operate family planning projects. Congress conditioned the grants with the restriction that none of the federal funds were to be "'used in programs where abortion is a method of family planning,'" *id.* at 178, 111 S. Ct. 1759 (quoting 42 U.S.C. § 300a-6). The Supreme Court upheld agency regulations preventing federally funded projects from providing abortion counseling or "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning.'" *Id.* at 180, 111 S. Ct. 1759 (quoting 42 C.F.R. § 59.10(a) (1989)). The Court ruled that the regulations did "not force the . . . grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from [government-funded] activities." *Id.* at 196, 111 S. Ct. 1759. When the government simply "insist[s] that public funds be spent for the purposes for which they were authorized," "the [g]overnment is not denying a benefit to anyone" and there is no unconstitutional penalty on free speech. *Id.* The Court noted that the regulations in *Rust* continued to allow healthcare organizations to advocate for abortion; they "simply [were] required to conduct those activities through programs that [were] separate and independent from the project that receives [federal] funds." *Id.* In this way, the regulations in *Rust* were like those in *Taxation With Representation* that allowed for protected lobbying to continue with non-deductible contributions, and unlike those in *League of Women Voters* that prohibited stations from editorializing even with private funds. *See id.* at 197-98, 111 S. Ct. 1759. The *Rust* Court explained that

> [b]y requiring that the [federal program] grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and [*Taxation With Representation*], not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the [federally funded] project in order to ensure the integrity of the federally funded program.

Id. at 198, 111 S. Ct. 1759; *see also Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 766 (2d Cir. 1999) [hereinafter *Velazquez I*] (explaining that the restriction in *Rust* "was limited to speech at odds with the values Congress was seeking to advance through its grant program"), *aff'd*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).

Finally, in *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), the Supreme Court upheld a law that denied public libraries funding to provide Internet access unless the libraries installed software to block access to obscenity and child pornography and to prevent children from accessing inappropriate material.[1] The plurality opinion rejected the argument that the law imposed an unconstitutional condition on the receipt of federal funding because it "penaliz[ed] a library for failing to install filtering software on every one of its Internet-accessible computers." *Id.* at 212, 123 S. Ct. 2297 (quoting *id.* at 226,

[1] The judgment of the Court was announced in an opinion by Chief Justice Rehnquist and joined by three other Justices. Two other Justices concurred in the judgment and each filed their own opinions.

123 S. Ct. 2297 (Stevens, J., dissenting)). The plurality explained that the law

> does not "penalize" libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, [the law] simply reflects Congress' decision not to subsidize their doing so. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

Id. (some internal quotation marks omitted). The plurality also expressly distinguished cases that "involved true penalties, such as denial of a promotion or outright discharge from employment," from "nonsubsidies," like the one at issue in *American Library Ass'n. Id.* at 212 n. 6, 123 S. Ct. 2297.

In this way, *American Library Ass'n* was precisely in line with *Speiser, Taxation With Representation, League of Women Voters*, and *Rust*. When acting pursuant to its Spending Clause powers, Congress may attach conditions to federal subsidies that have the effect of limiting recipients' First Amendment rights, as long as the conditions do not limit free speech outside of the scope of the government program and do not deny independent benefits to which recipients are otherwise entitled in an attempt to penalize First Amendment activity. Even when funding conditions limit or affect speech, such limits are generally permissible if they are meant only to ensure that government funds are used for the purposes for which they were authorized. This is because, absent special circumstances, there is no coercive

force behind a funding condition that is truly cabined to the federal subsidy program to which it is attached. If potential recipients do not wish to abide by the condition, they can simply choose not to accept the funds. *See Am. Library Ass'n*, 539 U.S. at 212, 123 S. Ct. 2297 ("To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance."); *Rust*, 500 U.S. at 199, 111 S. Ct. 1759 ("[T]his limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."); *id.* at 199 n.5, 111 S. Ct. 1759 ("[S]ubsidies are just that, subsidies. The recipient is in no way compelled to operate a [federally funded] project; it can simply decline the subsidy."); *Grove City College v. Bell*, 465 U.S. 555, 575, 104 S. Ct. 1211, 79 L. Ed. 2d 516 (1984) ("Grove City may terminate its participation in the [federal] program and thus avoid the requirements of [the condition]."); *cf. Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, __ U.S. __, 130 S. Ct. 2971, 2986, 177 L. Ed. 2d 838 (2010) ("[Plaintiff] in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies."); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 586, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (1983) (plurality opinion) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: the State or other grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt."); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 27, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981) (explaining that "legislation enacted pursuant to the spending power is much in the nature of a contract; in return for federal funds, the [re-

cipient] States agree to comply with federally imposed conditions" and concluding that "the court below failed to recognize the well-settled distinction between congressional 'encouragement' of state programs and the imposition of binding obligations on the States"). This is why it is usually the case that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez I*, 164 F.3d at 766; *accord Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 231 (2d Cir. 2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007). When adequate alternative channels are available, any restrictions on protected First Amendment activity imposed within the scope of the federal program only apply to that federally funded program and therefore are not the equivalent of direct restrictions or "true penalties," *Am. Library Ass'n*, 539 U.S. at 212 n. 6, 123 S. Ct. 2297. *See Brooklyn Legal Servs.*, 462 F.3d at 231; *Velazquez I*, 164 F.3d at 766.

2

Speiser and *Taxation With Representation* also emphasize that funding conditions may be unconstitutional if they "discriminate invidiously . . . in such a way as to 'aim at the suppression of dangerous ideas,'" *Regan v. Taxation With Representation*, 461 U.S. 540, 550, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) (quoting *Cammarano*, 358 U.S. at 513, 79 S. Ct. 524). The Supreme Court and this Court have addressed claims that funding conditions impermissibly discriminate on the basis of viewpoint in *Rust*, *Rosenberger*, *Finley*, the *Velazquez* cases, and *American Library Ass'n*.

In *Rust*, recipients of the family planning grants argued that the regulations restricting federal funds from being used for abortion services constituted impermissible viewpoint discrimination in favor of an anti-abortion position. 500 U.S. at 192, 111 S. Ct. 1759. Relying on *Taxation With Representation*, they argued that because the government "continue[d] to fund speech ancillary to pregnancy testing in a manner that is not even-handed with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint." *Id.* (internal quotation marks omitted). The Supreme Court rejected this challenge and found that Congress had not discriminated in favor of an anti-abortion position, but had "merely chosen to fund one activity to the exclusion of the other." *Id.* at 193, 111 S. Ct. 1759. The Court reiterated that "'[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.'" *Id.* (quoting *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977)). In other words, *Rust* was "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope," *id.* at 194, 111 S. Ct. 1759. This was so even though it cannot be denied that the scope of the government-funded project in *Rust* necessarily limited recipients' ability to advocate a pro-abortion viewpoint within the scope of the government program.[2]

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[2] While the *Rust* Court explained that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other," 500 U.S. at 193, 111 S. Ct. 1759, that may have been another way of stating the conclusion that the government had not *impermissibly* discriminated on the basis of viewpoint.

The Court applied *Rust* in the context of the provision of public-university funds to student groups in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). In that case, the University of Virginia denied funding from its Student Activities Fund to a student organization that wished to publish a newspaper that advocated Christian viewpoints. The Supreme Court analogized the Student Activities Fund to creating a "metaphysical" limited public forum for student speech. *Id.* at 829-30, 115 S. Ct. 2510. The Court explained that once the State "has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not reasonable in light of the purpose served by

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Cf. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) [hereinafter *Velazquez I*] ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under [the federal program] amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."); *Velazquez I*, 164 F.3d at 770 ("[W]e doubt that these words [in *Rust*] can reliably be taken at face value."). The regulations at issue in *Rust* did, in fact, prohibit a particular position on abortion. *See Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 ("We have said that viewpoint-based funding decisions can be sustained in instances . . . like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.' " (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995))); *Rust*, 500 U.S. at 209, 111 S. Ct. 1759 (Blackmun, J., dissenting) ("The regulations are also clearly viewpoint based."); *id.* at 210, 111 S. Ct. 1759 (quoting the agency regulation stating that a project "may not *encourage, promote or advocate* abortion" (emphasis added in *Rust*)); *see also* Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151, 170 (1996) ("The [*Rust*] regulations plainly discriminate on the basis of viewpoint. . . . ").

the forum, nor may it discriminate against speech on the basis of its viewpoint." *Id.* at 829, 115 S. Ct. 2510 (internal citations and quotation marks omitted). The Supreme Court rejected the University's attempt to rely on *Rust* for the proposition that it could make content-based funding decisions when necessary to accomplish its educational mission. *Id.* at 832-33, 115 S. Ct. 2510. In so doing, the Court acknowledged that it was true that "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Id.* at 833, 115 S. Ct. 2510. The Court pointed to *Rust* as a case where

> the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program. We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.

Id. (internal citations omitted). The Court explained, however, that it had never held that "viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." *Id.* at 834, 115 S. Ct. 2510. In sum, because the University offered funds to student groups specifically to "encourage a diversity of views from private speakers" and intended to facilitate

the speech of private "speakers who convey their own messages," the University could not, having created a quasi-limited public forum for student speech, then "silence the expression of selected viewpoints." *Id.* at 834-35, 115 S. Ct. 2510.

The Court had an opportunity to further explain *Rosenberger* in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998). In that case, Congress directed the National Endowment for the Arts ("NEA") to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in determining whether to award federal grants to artists. *Id.* at 572, 118 S. Ct. 2168. Performance artists who were denied funding claimed that the funding condition constituted viewpoint discrimination against art that offended standards of decency or did not respect mainstream values. *Id.* at 580, 118 S. Ct. 2168. The Supreme Court rejected this challenge and concluded that Congress's restriction would not "give rise to the suppression of protected expression." *Id.* at 585, 118 S. Ct. 2168. In so doing, the Supreme Court distinguished the nature of the program at issue in *Finley* with that in *Rosenberger*. The Supreme Court explained that in *Rosenberger*, the government "indiscriminately 'encourage[d] a diversity of views from private speakers.'" *Id.* at 586, 118 S. Ct. 2168 (quoting *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510). In *Finley*, on the other hand, the NEA was mandated to "make esthetic judgments" that were "inherently content based." *Id.* The purpose of the program, therefore, set the NEA subsidy "apart from the subsidy at issue in *Rosenberger*—which was available to all student organizations . . . and from comparably objective

decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to all newspapers and other periodical publications" at issue in other cases where viewpoint discrimination was found impermissible. *Id.* (internal citations and quotation marks omitted). The Supreme Court reiterated its warning that, nevertheless, the government may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," and may not aim at the suppression of dangerous ideas. *Id.* at 587, 118 S. Ct. 2168. Having found no evidence of such suppression, however, the logic of *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), applied: The government was free to "allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 587-88, 118 S. Ct. 2168 (relying in part on *Rust*, 500 U.S. at 193, 111 S. Ct. 1759); *accord Brooklyn Legal Servs.*, 462 F.3d at 230 ("[T]he government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech at stake.").

Our Court was called on to apply these cases in *Velazquez I*, 164 F.3d 757 (2d Cir. 1999). In that case, lawyers employed by grantees of the Legal Services Corporation ("LSC")[3] challenged a law that barred LSC funds from being used to perform various activities, in-

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[3] The LSC is "a non-profit government-funded corporation, created by [an Act of Congress], for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." *Id.* at 759 (internal citation and quotation marks omitted).

cluding lobbying, participating in class actions, seeking attorneys' fees, or seeking to reform or challenge existing welfare laws. We first analyzed *Taxation With Representation, FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), and *Rust* and summarized those cases as providing that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez I*, 164 F.3d at 766. We upheld all of the restrictions at issue from a facial challenge that they burdened the recipients' ability to use private funds to engage in First Amendment protected activity. *Id.* at 765-67. We relied on the teaching of *Taxation With Representation* and *League of Women Voters* (and the fact that "*Rust* is consistent with these cases") that subsidy restrictions are acceptable if there are "adequate alternative avenues for expression through affiliates." *Id.* at 766-67. We left for a future case, ultimately *Brooklyn Legal Services*, 462 F.3d at 219, 222-23, the question whether the alternatives provided under the LSC program were in fact adequate in the context of an as-applied challenge. *See infra* at 263.

In *Velazquez I*, we also upheld almost all of the restrictions against a viewpoint discrimination challenge because we found that they were in fact viewpoint neutral. 164 F.3d at 767-69. However, we concluded that the limitation that precluded a lawyer who received LSC funds from challenging an existing welfare rule in a suit on behalf of a client for welfare benefits was not viewpoint neutral. We noted that the restriction "clearly seeks to discourage challenges to the status quo." *Id.* at

770. The majority declined to follow then-Judge Jacobs's view, concurring in part and dissenting in part, that whether viewpoint discrimination was permissible in the context of the proviso at issue turned on whether the government, through funding the LSC, sought to promote a diversity of private views as it had done in *Rosenberger*. *See id.* at 775-77 (Jacobs, J., concurring in part, dissenting in part) (arguing additionally that the proviso was viewpoint neutral). Judge Jacobs concluded that the LSC program was not created to fund a diversity of private views and that when the government does not "create[] a limited public forum for the expression of diverse viewpoints," *id.* at 774, "the principle[]explicitly announced in *Rust* and not implicated by the facts of *Rosenberger* "applies: "[W]hen the government funds specific services it deems to be in the public interest, it may require grantees to get with its program," *id.* at 776. The majority, on the other hand, reasoned that *Rust* 's conclusion that the government in that case had "not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other," *Rust*, 500 U.S. at 193, 111 S. Ct. 1759, could not "reliably be taken at face value," *Velazquez I*, 164 F.3d at 770. Instead of adopting Judge Jacobs's framework, the majority focused on the type of speech at issue, noting that criticism of government policy garners the strongest First Amendment protection. *Id.* at 771. Because the majority found that a lawyer's argument that a welfare statute is invalid was closer to criticism of official policy than to the type of speech at issue in cases where the Supreme Court had rejected viewpoint discrimination challenges (abortion counseling in *Rust* and indecent art in *Finley*), it held that the restriction on

challenging welfare laws was subject to strict First Amendment scrutiny. *Id.* at 771-72.

Granting certiorari in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) [hereinafter *Velazquez II*], the Supreme Court appeared generally to endorse Judge Jacobs's framework for comparing the LSC restrictions with the restrictions at issue in *Rust* and *Rosenberger*, although it disagreed with Judge Jacobs's conclusion that the LSC program was more like the former than the latter. The Supreme Court explained that while the *Rust* Court "did not place explicit reliance on the rationale that counseling services of the doctors under Title X amounted to governmental speech . . . we have explained *Rust* on this understanding." *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043. The Court therefore noted that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.'" *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043 (internal citation omitted) (quoting *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510). The Court contrasted those cases with a situation in which the government "'does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.'" *Id.* at 542, 121 S. Ct. 1043 (quoting *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510). In the latter case, "'it does not follow . . . that viewpoint-based restrictions are proper.'" *Id.* (quoting *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510) (omission in *Velazquez II*). The Court acknowledged that the LSC program was different from the Stu-

dent Activities Fund at issue in *Rosenberger* because the LSC program did not seek to "encourage a diversity of views," but concluded that "the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message." *Id.* at 542, 121 S. Ct. 1043. The private nature of the speech facilitated was underlined by the fact that the government sought "to use an existing medium of expression"—the lawyer—client relationship—"and to control it, in a class of cases, in ways which distort its usual functioning." *Id.* at 543, 121 S. Ct. 1043.

The *Velazquez II* Court also rejected the government's argument that the restriction on suits challenging welfare laws was "necessary to define the scope and contours of the federal program" and "help[ ] the current welfare system function in a more efficient and fair manner by removing from the program complex challenges to existing welfare laws." *Id.* at 547, 121 S. Ct. 1043. The Court ruled that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Id.* The Court explained that "in the context of this statute, there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Id.* at 548, 121 S. Ct. 1043. In ultimately holding the restriction invalid, the Court emphasized that "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 548-49, 121 S. Ct. 1043 (citing *Regan v. Tax-*

ation With Representation, 461 U.S. 540, 548, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), and *Speiser v. Randall*, 357 U.S. 513, 519, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)).

Finally, in *United States v. American Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), a plurality of the Court explicitly rejected the argument that *Velazquez II* limited *Rust* to cases "'in which the government seeks to communicate a specific message.'" *Id.* at 213 n. 7, 123 S. Ct. 2297 (quoting *id.* at 228, 123 S. Ct. 2297 (Stevens, J., dissenting)). Dissenting, Justice Stevens relied on *Velazquez II* to argue that the condition requiring public libraries to install filtering software was an attempt to "distort[] th[e] medium" of "Internet-accessible computers." *Id.* at 227-28, 123 S. Ct. 2297. Justice Stevens rejected the *American Library Ass'n* plurality's assertion that *Rust* allowed Congress to restrict the scope of its own subsidy programs by arguing that "*Rust* only involved, and only applies to, instances of governmental speech—that is, situations in which the government seeks to communicate a specific message." *Id.* at 228, 123 S. Ct. 2297. The plurality, however, explained that "*Velazquez* held only that viewpoint-based restrictions are improper 'when the [government] does not itself speak or subsidize transmittal of a message it favors *but instead expends funds to encourage a diversity of views from private speakers*,'" *id.* at 213 n. 7, 123 S. Ct. 2297 (quoting *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043) (emphasis added in *American Library Ass'n*). The plurality reasoned that *Velazquez II* did not apply in *American Library Ass'n* because "public libraries do not install Internet terminals to provide a forum for Web publishers to express

themselves, but rather to provide patrons with online material of requisite and appropriate quality." *Id.*

III

In this case, the majority concludes that the Policy Requirement "warrants heightened scrutiny" because it is a "bold combination in a funding condition of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based." Maj. Op. at 236. However, the Policy Requirement is a permissible funding condition under the "unconstitutional conditions" doctrine as it has been applied in the government subsidy context because it neither imposes a penalty on protected First Amendment rights nor discriminates in a way aimed at the suppression of ideas. Furthermore, the viewpoint-based nature of the Policy Requirement is entirely proper because no public forum principles are implicated in this case.

A

Although it is obvious, it must be noted at the outset that the Policy Requirement does not actually compel anyone to speak the government's favored viewpoint. The Policy Requirement is a condition on the voluntary receipt of Leadership Act funds—funds which are available only to groups that wish to participate in the government's "global strateg[y] to combat HIV/AIDS," 22 U.S.C. § 7603(1). The Supreme Court has explained that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977); *see also Taxation With Representation*, 461 U.S. at 550, 103 S. Ct. 1997 ("Although

TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." (internal quotation marks omitted)); *id.* at 549, 103 S. Ct. 1997 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."); *id.* (noting that government appropriations, like tax deductions, are "a matter of grace [that] Congress can, of course, disallow . . . as it chooses" (internal quotation marks omitted)). "In diverse contexts, [the Supreme Court's] decisions have distinguished between policies that require action and those that withhold benefits." *Christian Legal Soc'y v. Martinez*, ___ U.S. ___, 130 S. Ct. 2971, 2986, 177 L. Ed. 2d 838 (2010); *see also Am. Library Ass'n*, 539 U.S. at 212 n.6, 123 S. Ct. 2297 (distinguishing "true penalties" from "nonsubsidies"); *ACORN v. United States*, 618 F.3d 125, 137 (2d Cir. 2010) (noting that for purposes of determining whether a law constitutes punishment in violation of the Bill of Attainder Clause "the plaintiffs are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities"), *cert. denied*, ___ U.S. ___, 131 S. Ct. 3026, 180 L. Ed. 2d 865, 2011 WL 704331 (2011). In seeking to partner with organizations that oppose prostitution, Congress "is dangling the carrot of subsidy, not wielding the stick of prohibition." *Christian Legal Soc'y*, 130 S. Ct. at 2986. Plaintiffs' speech is not compelled because if Plaintiffs do not wish to ascribe to the Policy Requirement, they may simply chose not to seek Leadership Act funds. The Supreme Court has repeatedly concluded that a subsidy, temptation, or motive provided by the

government is not, except in special circumstances, coercive and may simply be declined by any potential recipient. *See* cases cited *supra* at 248-49. "[S]ilence, or neutrality" is, in fact, "an option for Plaintiffs." *See* Maj. Op. at 234.

Of course, *Speiser* and its progeny teach that, in some instances, the denial of a government benefit can have the same "deterrent effect" on free speech as the direct regulation of speech. *See Speiser*, 357 U.S. at 518, 78 S. Ct. 1332. The "unconstitutional conditions" doctrine provides the framework for analyzing when the denial of a government benefit rises to the level of an infringement on free speech. Despite engaging in a thorough discussion of "unconstitutional conditions" cases in the government subsidy context, the majority puts that doctrine aside and appears to conclude that when a funding condition imposes an affirmative rather than negative speech requirement, it always "raise[s] serious First Amendment concerns," Maj. Op. at 234. As support for this proposition, the majority offers two pieces of evidence. First, the majority observes that *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), *Speiser*, and *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), were compelled speech cases where heightened scrutiny was applied or where the restrictions at issue were otherwise struck down. Second, the majority points to one sentence in *FAIR*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006), that it believes suggests that affirmative-speech funding conditions "push[ ] beyond," Maj. Op. at 234 n. 3, what the First Amendment allows.

First, as the majority recognizes, *Barnette*, *Speiser*, and *Wooley* are not cases where the government sought to appropriate public funds and then limit the scope of the subsidy program. *Wooley* and *Barnette* have traditionally been described as cases of the government's attempt to compel speech through the direct force of law. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) (describing *Barnette* as a case of "outright compulsion of speech"). While those cases can be creatively recast, as the majority does, to be, along with *Speiser*, cases about conditions placed on the governmental benefits of "going to school" (*Barnette*) and "using the roads" (*Wooley*), the government's attempt to deny the benefits in those cases was quite different from the Policy Requirement at issue here. In *Barnette* and *Wooley*, the only alternatives to accepting the government's benefits would be not to go to public school or not drive on the public roads, respectively. The government, therefore, used its monopoly power over public education and the public roads to put recipients to a choice that was obviously coercive—there was no realistic alternative to accepting the conditions and giving up First Amendment rights. *See Frost v. R.R. Comm'n*, 271 U.S. 583, 593, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) (explaining that the choice of whether to use the public highways or submit to a burden on constitutional rights gave the plaintiff "no choice, except a choice between the rock and the whirlpool"). In this case, Plaintiffs do not argue that Leadership Act funds are vital to their continued survival or even that they are the only source of funds to fight HIV/AIDS. *Cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 596-97, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (Scalia, J., concurring in the judgment)

(viewing skeptically the potential argument that the denial of an entirely voluntary subsidy may constitute coercion equivalent to a direct compulsion to speak if it were the only source of a recipient's funding). Moreover, in *Barnette*, *Speiser*, and *Wooley*, the threatened denial of a so called government benefit turned on requiring the recipient to speak a message that was unrelated to the government benefit at issue. The government in those cases threatened the denial of an existing benefit (going to school, a property tax exemption, and using the roads, respectively) as a means of coercing recipients to give up First Amendment rights. The restrictions in *Barnette*, *Speiser*, and *Wooley* were not merely attempts to confine government spending to the scope of a subsidy program, of course, because there was no relevant subsidy program at all in those cases. *Cf. Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997 ("But TWR is just as certainly incorrect when it claims that this case fits the *Speiser-Perry* model."). Therefore, the actual purposes of the government regulations were revealed and they were properly found invalid.

It is difficult to understand what relevance these cases can have to determining whether a true government subsidy condition is constitutional. *Speiser*, and particularly *Barnette* and *Wooley*, only provide the underlying substantive basis for Plaintiffs' compelled speech claims in this case, just as in *Taxation With Representation*, for example, the underlying substantive doctrine provided that Congress would violate the First Amendment if it directly restricted the right to lobby, *see id.*, 461 U.S. at 552, 103 S. Ct. 1997 (Blackmun, J., concurring) (citing *E.R.R. Presidents Conference v.*

Noerr Motor Freight, Inc., 365 U.S. 127, 137-38, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), for the proposition that lobbying is a protected activity). The existence of an underlying substantive First Amendment prohibition, however, did not resolve the constitutionality of the condition at issue in *Taxation With Representation;* nor does it here. Rather, this case calls on us to determine whether, despite Congress's broad power to impose conditions on federal spending, a funding condition that imposes an affirmative speech requirement is so coercive as to equal a direct compulsion of speech. The majority need not struggle from a blank slate with determining the proper way to approach this question. The Supreme Court has already provided the framework for us in *Taxation with Representation*, *Rust*, and the entire line of cases applying the "unconstitutional conditions" doctrine in the government subsidies context.

None of those cases turned on whether the alleged speech restriction was affirmative or negative.[4] Rather, the foundational principle of *Taxation With Representation* and *Rust* is that the government is allowed to "insist[ ] that public funds be spent for the purposes for which they were authorized," *Rust v. Sullivan*, 500 U.S.

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[4] The majority is certainly correct to note that none of the unconstitutional conditions cases even involved an affirmative speech condition. Maj. Op. at 234 n. 3. It is the intersection of those two doctrines that provides the novel constitutional question before us. The point remains, however, that there has never been a suggestion that the mere existence of a particular type of substantive First Amendment concern should control whether a government funding condition is unconstitutional. That is because "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher v. Roe*, 432 U.S. 464, 475, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977).

173, 196, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). The Policy Requirement in this case does precisely that. Congress determined that as part of fighting "the spread of the HIV/AIDS epidemic," "it should be the policy of the United States to eradicate" "[p]rostitution." 22 U.S.C. § 7601(23). It also determined that it desired to fight HIV/AIDS specifically through a strategy of "reduc[ing] HIV/AIDS behavioral risks" and "eliminat[ing] . . . the sexual exploitation of women and children." *Id.* § 7611(a)(12), (a)(12)(J). It therefore only authorized federal funds for organizations that shared its desire to affirmatively reduce HIV/AIDS behavioral risks, including its policy of eradicating prostitution. As a means to this end, the Agencies require recipients to affirm in funding award documents that they are in fact opposed to prostitution. The Policy Requirement is therefore precisely aimed at Congress's goal. Congress did not determine in the Leadership Act that it wished to fight HIV/AIDS through a strategy of remaining neutral on the issue of prostitution and other behavioral risks that contribute to the HIV/AIDS epidemic and that it would implement that strategy by simply withholding funding from groups that support prostitution, *cf. id.* § 7631(e). Rather, it specifically wanted to "eradicate" prostitution and other behavioral risks. *Id.* § 7601(23). While in *Rust*, Congress wished to *not* fund abortion activities through its family planning grants, here Congress sought to eradicate prostitution and decided to affirmatively fund only groups that shared its particular approach to fighting HIV/AIDS. It is perfectly within Congress's Spending Clause powers to craft a condition that "insist[s] that public funds be spent for the purposes for which they were authorized," *Rust*, 500 U.S. at 196, 111 S. Ct. 1759.

The second reason the majority concludes that affirmative speech requirements always "raise serious First Amendment concerns," Maj. Op. at 234, is *FAIR*'s statement that "[t]here is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse," *FAIR*, 547 U.S. at 61, 126 S. Ct. 1297. In *FAIR*, various law schools challenged Congress's decision to withhold federal grants from educational institutions that denied military recruiters access equal to that of other recruiters. *Id.* at 51, 126 S. Ct. 1297. The Supreme Court did not engage in an "unconstitutional conditions" analysis because it concluded that "the First Amendment would not prevent Congress from directly imposing the . . . access requirement" on universities in any event. *See id.* at 59-60, 126 S. Ct. 1297 (declining to "determine when a condition placed on university funding goes beyond the reasonable choice offered in *Grove City* and becomes an unconstitutional condition" (internal quotation marks omitted)). In that context, the Supreme Court addressed the law schools' argument that the access requirement constituted compelled speech because the schools were forced, if they sent e-mails and posted notices regarding other campus recruiters, to do the same for military recruiters. *Id.* at 61-62, 126 S. Ct. 1297. The Supreme Court set out the compelled-speech doctrine pursuant to *Barnette* and *Wooley* and concluded that "recruiting assistance . . . is a far cry from the compelled speech in *Barnette* and *Wooley*." *Id.* at 62, 126 S. Ct. 1297. The Court explained that Congress's restriction "does not dictate the content of the speech at all. . . . There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id.* The Court therefore found that a necessary but not sufficient ele-

ment of an unconstitutional funding condition was absent—there would be no underlying First Amendment violation if the condition was applied directly. The Court had no need to address whether a funding condition that required recipients to espouse a particular message would be constitutional under the First Amendment and said nothing about that issue. *FAIR*, therefore, has little relevance to the key issue in this case for the same reason that *Barnette*, *Speiser*, and *Wooley* are not determinative: There is a basic difference between the denial of government funding and a direct compulsion to speak.

B

Because there is a doctrine that precisely addresses whether a government subsidy condition is constitutional pursuant to the First Amendment, I would apply it here. The Policy Requirement imposes neither of the two types of burdens identified in *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), as penalizing free speech such that a subsidy condition approaches the coercive effects of a direct restriction. First, the Policy Requirement does not deny any independent government benefit to which Plaintiffs are otherwise entitled. The only consequence if Plaintiffs do not subscribe to the Leadership Act's Policy Requirement is that they will not receive Leadership Act funds. This is unlike *Speiser* (and *Barnette* and *Wooley* if re-characterized as government-funding cases) where the denial of independent, already-existing benefits was threatened. It is also unlike the denial of all business deductions for a taxpayer who lobbied contemplated in Justice Douglas's concurrence in *Cammarano v. United States*, 358 U.S. 498, 515, 79 S. Ct.

524, 3 L. Ed. 2d 462 (1959), as "a penalty on the exercise of First Amendment rights." The only government benefit at risk is the subsidy that the government chose to restrict in order to achieve its policy goals.

The Policy Requirement also does not restrict Plaintiffs' First Amendment speech outside of the scope of the Leadership Act program. This is because the organizational integrity guidelines implemented by the Agencies allow for exactly the affiliate structure that saved the funding conditions at issue in *Taxation With Representation* and *Velazquez I* and was found missing in *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984). In this case, Plaintiffs may create affiliate organizations to receive Leadership Act funds and comply with the Leadership Act's Policy Requirement. Plaintiffs, therefore, are free to continue to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds. In this way, the Policy Requirement coupled with the Guidelines only ensures that Leadership Act funds are spent within the scope of the government program—that is, on organizations that share Congress's desire to "eradicate" the practice of "[p]rostitution and other sexual victimization" because they "are additional causes of and factors in the spread of the HIV/AIDS epidemic," 22 U.S.C. § 7601(23). The Policy Requirement and Guidelines therefore impose no penalty on Plaintiffs' First Amendment rights.

The majority rejects the argument that the Guidelines save the Policy Requirement from infringing Plaintiffs' right to refrain from speaking. The majority explains that in previous cases, affiliate provisions like the Guidelines provided an "*outlet* " that allowed organiza-

tions to say what was otherwise "impermissibly prohibited" by federal subsidy programs. Maj. Op. at 259 (citing *Taxation With Representation* and *League of Women Voters*). The majority argues that this case is different because an "adequate alternative channel" cannot remedy a compelled speech condition "by affording an outlet to engage in privately funded *silence*." Maj. Op. at 239. This logic misses the point of "adequate alternative channels" in the government subsidy context and again fails to account for the fact that the Policy Requirement is merely a subsidy condition, not a mandate to speak.[5] Provisions allowing recipients of government funding to establish affiliate organizations to either receive the government funds or to operate exclusively with private funds are important because they remedy one way that a funding condition, although merely a funding condition, could be so coercive as to rise to the level of a direct restriction on speech. Affili-

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[5] It is true that we have explained that "[t]aking [*Taxation With Representation*, *League of Women Voters*, and *Rust*] together, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected *expression*." *Velazquez I*, 164 F.3d at 766 (emphasis added); *accord Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 231 (2d Cir. 2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007). The cases we summarized, however, all dealt with subsidy conditions that imposed negative restrictions on speech and therefore it is no surprise that the dual-structures contemplated were thought of as "adequate alternative channels" for restricted speech rather than for the right to refrain from speaking. In this case, it may be that it does not make sense to think of the Guidelines as providing an "outlet to engage in privately funded *silence*," Maj. Op. at 239, but that does not affect whether affiliate provisions, like the Guidelines, prevent subsidy conditions, like the Policy Requirement, from amounting to penalties on First Amendment rights. I see no reason why an affirmative-speech subsidy condition should be treated differently.

ate structures prevent subsidy conditions from reaching beyond the scope of the subsidy program and restricting what an organization may or may not say outside of the scope of the program. It is in this way that subsidy conditions could become penalties on First Amendment rights equivalent to a direct restriction. *See Taxation With Representation*, 461 U.S. at 545, 103 S. Ct. 1997 ("The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity. . . . Congress has merely refused to pay for the lobbying out of public monies.").

For the reasons explained above, the fact that an affirmative speech condition rather than a negative speech condition is at issue here does not change the analysis of whether a subsidy condition rises to the level of a direct regulation of a constitutional right. *See* discussion *supra* at 254-58. Moreover, a direct restriction on speech is just as offensive to the First Amendment as is a direct compulsion to speak, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance. . . . "), *see also Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 481, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997) (Souter, J., dissenting) ("[C]ompelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny."), and funding conditions that implicate these principles should be subject to the same analysis.[6]

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[6] While it is true that dicta in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 63 S. Ct. 1178, 87 L. Ed. 1628

This is why the District Court's dismissal of any saving effect of the Guidelines in this case because "the clause requiring Plaintiffs to adopt the Government's view regarding . . . prostitution remains intact," *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 570 F. Supp. 2d 533, 545 (S.D.N.Y. 2008) [hereinafter *AOSI*], and, in turn, the majority's quotation of that sentence, is inexplicable. So too is the majority's assertion that "there remains, on top of [the Guidelines], the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution." Maj. Op. at 239. It bears repeating: The Policy Requirement together with the Guidelines do not *require* Plaintiffs or affiliates to adopt the government's viewpoint regarding prostitution or to say anything. The Policy Requirement is a funding condition and it must be analyzed pursuant to the cases addressing "unconstitutional conditions" on government subsidies. Applying those cases, the Policy Requirement and the Guidelines do not penalize or coerce First Amendment protected conduct and do not compel speech outside of the scope of the government program. For all of these reasons, the Policy Requirement is not subject to heightened First Amendment scrutiny.

(1943), suggests that once the government is found to have compelled speech, it may be required to offer "even more immediate and urgent grounds" than when it restricts speech, that case does not speak to determining when a funding condition actually compels speech. The level of interest the government must demonstrate is only relevant once an infringement of First Amendment rights is demonstrated. The question in this case is whether the funding condition actually infringes First Amendment rights in the first instance; I would hold that it does not.

While the majority does not address the issue, Plaintiffs additionally argue that the Guidelines do not in fact provide an adequate alternative channel for protected First Amendment activity because they are too burdensome in practice. The District Court below addressed this challenge, although it did so in error by reviewing the Guidelines under heightened scrutiny. *Id.* at 548-9. We have explained that heightened scrutiny or an "undue burden" test does not apply to the question whether alternative channels like those at issue here are in fact adequate on an as-applied challenge. *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 230-32 (2d Cir. 2006), *cert. denied*, 552 U.S. 810, 128 S. Ct. 44, 169 L. Ed. 2d 11 (2007). Rather, the proper question is whether any burdens on plaintiffs under the organizational integrity guidelines "in effect preclude the plaintiffs from establishing an affiliate. If so, the alternative channels are inadequate, and the plaintiffs may prevail on their as-applied challenge." *Id.* at 233. Because I would vacate the preliminary injunction and remand this case to the District Court, Plaintiffs would be free to raise any as-applied challenge to the Guidelines under the proper *Brooklyn Legal Services* standard at that time.

C

After concluding that the affirmative nature of the Policy Requirement "raises serious First Amendment concerns," the majority ultimately asserts that heightened scrutiny applies in this case because of the "bold combination" of an affirmative-speech requirement that is also viewpoint-based. Maj. Op. at 234-35, 235-36. For the reasons explained above, nothing about the affirmative nature of the Policy Requirement requires height-

ened scrutiny to apply. Likewise, contrary to the majority's suggestion, viewpoint-based funding conditions are not inherently "constitutionally troublesome," Maj. Op. at 235, and the viewpoint-based nature of the funding condition at issue in this case does not warrant heightened scrutiny.

Funding conditions that discriminate on the basis of viewpoint are only subject to heightened scrutiny (1) when they are "aimed at the suppression of dangerous ideas," *Speiser v. Randall*, 357 U.S. 513, 519, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (internal quotation marks omitted), or (2) when they are imposed in the context of a program designed to encourage a diversity of views or to facilitate private speech in a quasi-public forum context, *see Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510, *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043. These classes of cases are not unrelated. The presence of viewpoint discrimination in the context of a government program that has no policy objective other than funding private speech tends to demonstrate that any attached viewpoint-based condition is primarily intended to influence behavior or to suppress certain ideas rather than to achieve a legitimate objective or to promote a government message. However, "when a spending program is not universal but limited, providing benefits to a restricted number of recipients" (as is the case here and in *Rust*), and when that program "does not create a public forum, proving coercion is virtually impossible, because simply denying a subsidy does not coerce belief, and because the criterion of unconstitutionality is whether denial of the subsidy threatens to drive certain ideas or viewpoints from the marketplace." *Velazquez II*, 531

U.S. at 552, 121 S. Ct. 1043 (Scalia, J., dissenting) (internal quotation marks and citation omitted).

First, Plaintiffs do not urge, and the majority correctly does not conclude, that the Policy Requirement is aimed at the suppression of any dangerous ideas. There is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy Requirement was to suppress pro-prostitution views (or even neutrality on the issue). Congress could hardly have thought the best way to suppress support for prostitution in the public discourse would be to offer federal funds to a narrow range of groups that wished to combat HIV/AIDS, but only if they espoused an anti-prostitution position. Both the purpose and effects of the Policy Requirement are a far cry from those cases where the government condition was clearly aimed at the suppression or compulsion of speech qua speech. *See, e.g., Grosjean v. Am. Press Co.*, 297 U.S. 233, 250, 56 S. Ct. 444, 80 L. Ed. 660 (1936) ("[The tax] is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information."); *see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 579-80, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983) (discussing *Grosjean*); *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332. Rather, the Policy Requirement is aimed at achieving Congress's legitimate goal of eradicating prostitution and reducing behavioral risks as a technique of fighting HIV/AIDS. Moreover, the organizational integrity guidelines leave Plaintiffs with precisely the same ability to remain silent or speak a pro-prostitution message if they choose. The Policy Requirement and Guidelines therefore in no way silence

government criticism or contrary views on prostitution and HIV/AIDS. Only affiliates that voluntarily choose to accept Leadership Act funds must oppose prostitution; Plaintiffs and all other speakers are free to speak their own messages, including messages contradictory to those of separate affiliate groups.

With regard to the second category of cases, the Supreme Court "has recognized that the existence of a Government subsidy, in the form of Government-owned property, does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity." *Rust v. Sullivan*, 500 U.S. 173, 199-200, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (internal quotation marks omitted). *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), and *Velazquez II* extended this principle to conclude that viewpoint discrimination is improper not only in traditional public fora, but also in cases where the government essentially creates a limited public forum by "offer[ing] to pay . . . private speakers who convey their own messages," *Rosenberger*, 515 U.S. at 835, 115 S. Ct. 2510. Once the government has offered to pay private speakers to speak their own messages, the government may not discriminate "against speech otherwise within the forum's limitations." *Id.* at 830, 115 S. Ct. 2510. One example of a subsidy program that pays private speakers but does not create a limited public forum is a program in which the government " 'use[s] private speakers to transmit specific information pertaining to its own program,'" *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 (quoting *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510), or "subsidize[s] transmittal of a message it favors," *Rosen-*

berger, 515 U.S. at 834, 115 S. Ct. 2510. In any event, however, the "salient point" in the Supreme Court's analysis of those programs in which viewpoint discrimination has been found improper is that those programs were "designed to facilitate private speech." *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043; *see also United States v. Am. Library Ass'n*, 539 U.S. 194, 213 n.7, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) (plurality opinion) (explaining that *Rust* does not only apply when the government seeks to communicate a specific message).

In this case, it is plain that the government does not seek to "encourage a diversity of views from private speakers," as it did in *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510, by offering to reimburse student groups for newspaper publication costs. The purpose of the Leadership Act is not to fund a variety of non-governmental organizations interested in fighting HIV/AIDS, each of whom might have a different viewpoint on prostitution and sex trafficking. On the contrary, the Leadership Act specifically seeks to advance an anti-prostitution, anti-sex-trafficking approach to combating HIV/AIDS. *See* 22 U.S.C. §§ 7601(23), 7611(a)(12). In enacting the Leadership Act, Congress made an inherently viewpoint-based judgment concerning the allocation of public resources for fighting HIV/AIDS, which sets the program "apart from the subsidy at issue in *Rosenberger* . . . and from comparably objective decisions on allocating public benefits," *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998), at issue in cases where viewpoint discrimination was found invalid. In other words, public forum principles do not apply in this case because Congress did not authorize Leadership Act funds "in order

to create a public forum for [Plaintiffs] to express themselves," *Am. Library Ass'n*, 539 U.S. at 206, 123 S. Ct. 2297 (ruling that public forum principles do not apply because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves"), but rather to achieve particular policy goals.

Likewise, the purpose of the Leadership Act is not to generally "facilitate private speech," as was the purpose of the LSC program in the *Velazquez* cases. In those cases, "Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients." *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043. The LSC program was "not advancing any particular set of values that might be diluted or distorted," *Velazquez I*, 164 F.3d at 766, by the grantee-lawyers' speech or decision not to speak. Indeed, the LSC lawyer's role specifically was to speak against the government in court in a claim for welfare benefits—the speech was "on the behalf of [the lawyer's] private, indigent client" and inherently not on behalf of the government. *Velazquez II*, 531 U.S. at 542, 121 S. Ct. 1043. Therefore the case was distinguishable from *Rust* because, with regard to the LSC program, "there [was] no programmatic message of the kind recognized in *Rust*." *Id.* at 548, 121 S. Ct. 1043. Here, on the contrary, instead of generally facilitating private speech, the purpose of the Leadership Act program is to combat HIV/AIDS in a particular way. The government has chosen to fund a method of combating HIV/AIDS that includes its private partners taking an anti-prostitution, anti-sex-trafficking position to the exclusion of an alternative program that would allow grantees to remain silent on the issue or to speak a pro-

prostitution message. Unlike in the *Velazquez* cases, the government's "set of values" and strategy of combating HIV/AIDS would be weakened, "diluted or distorted," *Velazquez I*, 164 F.3d at 766, if its partners were allowed to speak a pro-prostitution, pro-sex-trafficking message or to stay silent on the issue. No matter how vehemently Plaintiffs may disagree with the government's policy towards prostitution and HIV/AIDS, Congress decided that part of its anti-HIV/AIDS strategy was to "eradicate prostitution," 22 U.S.C. § 7601(23). In this case, like *Rust*, the government is allowed to specify its grantees' position on prostitution "deemed necessary for its legitimate objective[ ]," *Velazquez II*, 531 U.S. at 548, 121 S. Ct. 1043, of reducing HIV/AIDS.

The majority rejects *Rust*'s application here because it believes the Policy Requirement "compels Plaintiffs to voice the government's viewpoint . . . as if it were their own," Maj. Op. at 237. First, it must be reiterated that the Policy Requirement does not compel any speech. *See* discussion *supra* at 254-58. Second, just as with the cases addressing whether subsidy conditions are coercive, none of the cases addressing allegedly viewpoint-discriminatory subsidy conditions have turned on whether an affirmative or negative speech requirement was at issue. Rather, the "salient point" for viewpoint-discrimination analysis is whether the government has effectively created a limited public forum. In this case, the government's program is not designed to "encourage a diversity of views from private speakers," *Rosenberger*, 515 U.S. at 834, 115 S. Ct. 2510, nor is it intended to facilitate private speech, *Velazquez II*, 531 U.S. at 544, 121 S. Ct. 1043. And "viewpoint-based funding decisions can be sustained in instances in which the government

. . . 'use[s] private speakers to transmit specific information pertaining to its own program.'" *Id.* at 541, 121 S. Ct. 1043 (internal citation omitted) (quoting *Rosenberger*, 515 U.S. at 833, 115 S. Ct. 2510).

The majority's only additional professed rationale for casting *Rust* and its progeny aside is that the *Rust* Court stated that "[n]othing in [the challenged regulations] requires a doctor to represent as his own any opinion that he does not in fact hold" and noted that "[t]he doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program," *Rust v. Sullivan*, 500 U.S. 173, 200, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). However, this observation came only in the *Rust* Court's consideration of the claim by the plaintiffs in that case that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government," *id.* at 200, 111 S. Ct. 1759, an issue the Court did not reach. Instead, the Court concluded that because the doctors in *Rust* were not required to state any opinion that they did not hold and could simply say that abortion advice was outside of the scope of the program, the regulations did "not significantly impinge upon the doctor-patient relationship." *Id.* In this case, there is no such traditional relationship that should enjoy extra First Amendment protection, nor would any relationship as sensitive as the doctor-patient relationship be impinged if a recipient of Leadership Act funds did not actually oppose prostitution and sex trafficking, but said it did in order to receive government funding. The majority's own example of a situation in which it believes an affirmative speech requirement would be permitted sug-

gests that the risk that a recipient would be tempted to state an opinion it did not hold—in other words, to lie—to receive government funding does not invalidate a government subsidy condition. The majority "do[es] not doubt" that the government could require grantees of a "Just Say No" to drugs program to state that they oppose drug use by children. Maj. Op. at 237. But what about potential grantees who do not actually oppose drug use by children, but are tempted by the offer of funds? It cannot be that their constitutional rights are violated because as a condition of receiving federal money, they must "voice the government's viewpoint and . . . do so as if it were their own." Maj. Op. at 237.

Despite all of this, the majority concedes that the government may impose an affirmative, viewpoint-based funding condition if "the government's program *is,* in effect, its message," or, perhaps, if the message is "central" to the program. Maj. Op. at 238-39, 239. The majority, however, concludes that because the "stated purpose of the Leadership Act is to *fight HIV/AIDS,* as well as tuberculosis, and malaria[,] Defendants cannot now recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign." Maj. Op. at 238 (footnote omitted). True enough. *See Velazquez II,* 531 U.S. at 547, 121 S. Ct. 1043 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."). But this case is not like *Velazquez II* where the Supreme Court found that there was "no programmatic message of the kind recognized in *Rust,*" *id.* at 548, 121 S. Ct. 1043, that would support restricting lawyers' First Amendment rights. In this case, the government is not

attempting to recast a program that was meant to merely provide funds to allow private speakers to speak their own messages into a program that could support the Policy Requirement. Rather, the Policy Requirement is obviously related to substantive policy goals of the Leadership Act—goals beyond, and different from, simply subsidizing private speech for its own sake. *See* 22 U.S.C. § 7601(23) ("Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices."); *id.* § 7611(a)(12), (a)(12)(J) (directing that the President's strategy to fight HIV/AIDS shall "make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by . . . eliminat[ing] . . . the sexual exploitation of women and children"). This is not a case where the funding condition is so attenuated from the purpose for which the public funds were appropriated as to invalidate the condition. *Compare South Dakota v. Dole*, 483 U.S. 203, 207-08, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (concluding that while "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs," "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel" (internal quotation marks omitted)) *with id.* at 213-14, 107 S. Ct. 2793 (O'Connor, J., dissenting) ("In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.").

Moreover, the majority cites no support for its implication that the purpose of the Leadership Act must be

examined at the broadest possible level of generality to determine whether public-forum principles apply to this case. *See* Maj. Op. at 236-37("The stated purpose of the Leadership Act is to *fight HIV/AIDS*, as well as tuberculosis, and malaria." (footnote omitted)). There is no reason why a government subsidy program must actually *be* a messaging campaign or even have a message as a "central" component in order to support a viewpoint discriminatory condition that is germane to legitimate substantive goals of the program. *Rust*, *Rosenberger*, and *Velazquez II* did not address the size of, number of purposes of, or any potential "subsidiary issue[s]," Maj. Op. at 238, in the government programs in which those cases suggested that viewpoint discriminatory conditions would be permissible.

The majority also questions the Leadership Act's commitment to partnering with groups that oppose prostitution as a means of combating HIV/AIDS because the Policy Requirement specifically exempts four groups from compliance: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and United Nations agencies, *see* 22 U.S.C. § 7631(f). One of these organizations, the International AIDS Vaccine Initiative, is focused on the development of an AIDS vaccine. The fact that Congress determined that while it generally only wished to partner with groups that opposed prostitution, it nevertheless wanted to fund research for an AIDS vaccine does not call into question Congress's desire to eradicate prostitution as part of its efforts to combat HIV/AIDS. Congress may simply have determined that AIDS-vaccine research was an even more important priority. The three remaining groups are

"public international organizations" in which the United States participates and which are made up primarily or exclusively of sovereign states. *See generally id.* § 288 (discussing "public international organizations"). Again, nothing about the fact that Congress chose to make Leadership Act funds available to these international organizations without requiring them to comply with the Policy Requirement undermines Congress's strong desire to only partner with groups that share its opposition to prostitution. Congress may have determined that the goals of the Policy Requirement were outweighed by sensitive diplomatic considerations. The majority suggests that if Congress truly wished to support "anti-prostitution advocacy . . . it could, of course, simply choose not to fund these organizations." Maj. Op. at 238. But the decision whether to withhold Leadership Act funds from these organizations or instead to provide an exemption from the Policy Requirement is precisely the kind of policy judgment that Congress, not the courts, is entitled to make. *Cf. Regan v. Taxation With Representation*, 461 U.S. 540, 549, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) ("Congressional selection of particular entities or persons for entitlement to this sort of largesse is obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find." (internal quotation marks omitted)).

Finally, the majority relies on the fact that "prostitution in the context of the international HIV/AIDS-prevention effort[ ] is a subject of international debate" and notes that it concerns a "controversial public issue," to argue that Plaintiffs' speech rights are important. Maj. Op. at 236-37 & n.4. The majority also rejects Defen-

dants' argument that strict scrutiny should not apply to the Policy Requirement because it implicates foreign affairs. But the substantive validity or controversial nature of Plaintiffs' position on prostitution and any foreign affairs repercussions for the government both are not determinative of whether the Policy Requirement is constitutional pursuant to the "unconstitutional conditions" doctrine and the viewpoint-discrimination cases discussed above. Because I conclude that the Policy Requirement is not subject to heightened scrutiny in any event, I need not reach these arguments. Nevertheless, I believe my observations sufficiently dispose of them.

For all of the reasons explained above, I conclude that the Policy Requirement's viewpoint-based nature is permissible in this case and that it is not subject to heightened judicial scrutiny.

IV

"A plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). We review a district court's grant of a preliminary injunction for abuse of discretion. *Alleyne v. N.Y. State Educ. Dep't*, 516 F.3d 96, 100 (2d Cir. 2008). "A district court abuses its discretion when (1) its decision rests on an error of law. . . . " *Mullins v. City of New York*, 626 F.3d 47, 51 (2d Cir. 2010) (internal quotation marks omitted). The District Court in this case granted Plaintiffs' request for a preliminary injunction because it con-

cluded that the Policy Requirement "would not survive heightened scrutiny, and also impermissibly compel[s] speech" and therefore it "violate[s] the First Amendment." *AOSI*, 570 F. Supp. 2d 533, 549 (S.D.N.Y. 2008). For the reasons explained above, I conclude that the District Court erred because the Policy Requirement is not subject to heightened scrutiny, does not compel speech, and does not violate the First Amendment. Furthermore, because Congress's decision to enact the Policy Requirement is an entirely rational exercise of its powers pursuant to the Spending Clause, I would conclude that Plaintiffs have not established a likelihood of succeeding on the merits of their claim that the Policy Requirement is unconstitutional. Accordingly, I would vacate the preliminary injunction and remand the case for any further proceedings consistent with my views.[7]

* * *

With today's decision, the majority unnecessarily splits from the Court of Appeals for the District of Columbia Circuit on this very issue. In 2007, the D.C. Circuit Court of Appeals rejected an almost identical challenge to the Leadership Act by a potential grantee that refused to adopt a policy opposing prostitution. *See DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d

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[7] The District Court did not reach Plaintiffs' vagueness claims because the Court granted the preliminary injunction on the grounds that the Policy Requirement and Guidelines violated the First Amendment because they "would not survive heightened scrutiny, and also impermissibly compel speech," *AOSI*, 570 F. Supp. 2d at 549. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976). Because the majority also does not reach Plaintiffs' vagueness challenge, I do not pass upon it here.

758 (D.C. Cir. 2007). The Court explained that the Act's viewpoint-based restrictions were permissible because "the government has not created a program to encourage private speech," as it did in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), and *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), but rather, "as in *Rust*, the government's own message is being delivered." *DKT Int'l*, 477 F.3d at 762 (internal quotation marks omitted). While the organizational integrity guidelines were not yet in place when *DKT International* was decided, the Court also rejected the plaintiff's argument that, pursuant to *Rust*, funding restrictions may only apply to particular projects and not to recipients in general. The Court explained that there was no constitutional violation in the Leadership Act because "[n]othing prevents [the plaintiff] from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution. . . . The parent organization need not adopt the policy." *Id.* at 763. Finally, the Court also rejected the plaintiff's compelled speech challenge, distinguishing *Barnette*, *Speiser*, and *Wooley* from the case before it:

> In each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. None involved the government's selective funding of organizations best equipped to communicate its message. Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message

> on pain of losing their public education, *Barnette*, 319 U.S. at 629, 63 S. Ct. 1178, or access to public roads, *Wooley*, 430 U.S. at 715, 97 S. Ct. 1428.

DKT Int'l, 477 F.3d at 762 n. 2.

Furthermore, and as explained above, I believe that the "unconstitutional conditions" doctrine and the cases addressing viewpoint discrimination in the government subsidy context provide the appropriate framework for analyzing this case. I conclude that those cases demonstrate that the Policy Requirement is constitutional. Nevertheless, it has been said that the "unconstitutional conditions" doctrine is a "troubled area of [Supreme Court] jurisprudence," *Rust*, 500 U.S. at 205, 111 S. Ct. 1759, and that the Supreme Court's unconstitutional conditions cases "seem a minefield to be traversed gingerly," Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415-16 (1989). Because the majority today, however, does more to further complicate the doctrine than to clarify it, the Supreme Court may wish to grant certiorari to set us straight.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-4917-cv

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL, INTERACTION, PLAINTIFFS-APPELLEES, OPEN SOCIETY INSTITUTE, PLAINTIFF

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, RAJIV SHAH,* IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, AND HIS SUCCESSORS, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, THOMAS R. FRIEDEN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HIS SUCCESSORS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HER SUCCESSORS, DEFENDANTS-APPELLANTS

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* Named officials have been substituted for their predecessors pursuant to Fed. R. App. P. 43(c)(2).

Argued: Dec. 9, 2010
Decided: July 6, 2011
Opinion on Rehearing: Feb. 2, 2012

ORDER

ROSEMARY S. POOLER, Circuit Judge, concurs by opinion from the denial of rehearing en Banc. JOSÉ A. CABRANES, Circuit Judge, joined by REENA RAGGI and DEBRA ANN LIVINGSTON, Circuit Judges, dissents by opinion from the denial of rehearing en banc.

Following disposition of this appeal on July 6, 2011, Defendants-Appellants United States Agency for International Development, et al., filed a petition for rehearing en banc. A poll of the active members of the Court having been conducted, and there being no majority favoring en banc review, rehearing en banc is hereby **DENIED.**

JOSÉ A. CABRANES, Circuit Judge, with whom Judge RAGGI and Judge LIVINGSTON join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the decision of the Court to deny rehearing *en banc* in this case. The question presented is indisputably one of exceptional importance. It is also one that has divided the Courts of Appeals.

In appropriating billions of dollars to combat the global HIV/AIDS epidemic, Congress found that "[p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex in-

dustry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23). It thus required, among other things, that in order to receive funds under this law, organizations must have "a policy explicitly opposing prostitution and sex trafficking." *Id.* § 7631(f). This is an uncomplicated and commonsensical condition of federal funding—but a divided panel of our Court has affirmed an injunction forbidding its enforcement.

Despite Congress's broad powers under the Spending Clause,[1] the panel majority in this case held that requiring organizations that accept federal program funds to have a policy consistent with a clearly-stated purpose of that funding program "infringes" the freedom of speech guaranteed by the First Amendment. The decision of the panel majority, which diverges from that of our sister circuit in the District of Columbia, is based on a newly uncovered constitutional distinction between "affirmative" and "negative" speech restrictions. *See Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 239 (2d Cir. 2011). Presented with the opportunity to restore uniformity in

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[1] The Spending Clause of the Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. Incident to the Spending Clause power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)).

the enforcement of a federal statute by rehearing the case *en banc*, a majority of this Court voted to avoid doing so. I dissent from that decision.[2]

I.

The statute at issue is the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (the "Leadership Act"), 22 U.S.C. § 7601 *et seq.*, which provides $48 billion in taxpayer funds to combat the global HIV/AIDS epidemic,[3] *id.* § 7671(a), and includes an explicit congressional finding that "[p]rostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices," *id.* § 7601(23). In keeping

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[2] In her opinion concurring in the denial of *en banc* review, Judge Pooler asserts that this opinion "adds little to Judge Straub's dissent from the panel's opinion." Pooler, J., Op. Concurring in Denial of Reh'g *En Banc*, at 131 ("Pooler Op."). Maybe so—but the purpose of this opinion is not to propose a new theory of dissent, but to suggest that the reasons already articulated form a compelling basis for *en banc* review. Indeed, if the controlling body of law is as "complicated," "contentious," "messy," and "unsettled," as Judge Pooler claims, *id.* at 132, that assessment favors careful *en banc* review of an opinion—by a divided panel—that affirms an injunction of federal legislation.

Judge Pooler would have us believe that *en banc* review "would occasion a monumental expenditure of the time and resources of our Court," with "little prospect of resolving any of the current doctrinal disarray." *Id.* at 132. In her view, the daunting task of "tackl[ing]" the question presented is apparently beyond the "willing[ness]" and "ab[ility]" of the *en banc* court of the Second Circuit. *Id.* at 133. Instead, Judge Pooler would prefer "the Supreme Court's attention." *Id.* So be it.

[3] The original statute authorized $3 billion for each of the fiscal years 2004 through 2008; the current version, which was reauthorized and amended in 2008, authorizes $48 billion for the five-year period beginning October 1, 2008.

with that finding, Congress imposed two relevant conditions on the use of Leadership Act funds: that (1) "no funds . . . may be used to promote or advocate the legalization or practice of prostitution or sex trafficking," *id.* § 7631(e); and (2) with specified exceptions, "[n]o funds . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," *id.* § 7631(f). The latter provision, known as the "policy requirement," forms the subject of this appeal.

The panel decision in this case characterized the policy requirement as "impermissibly compelling Plaintiffs to espouse the government's viewpoint on prostitution." *Alliance for Open Soc'y*, 651 F.3d at 230. Based substantially on the "affirmative" nature of the policy requirement, the panel declared that "[i]t is this bold combination in a funding condition of a speech-targeted restriction that is both affirmative and quintessentially viewpoint-based that warrants heightened scrutiny." *Id.* at 236. Having applied "heightened scrutiny," the panel of course concluded that the plaintiffs had demonstrated a likelihood of success on the merits of their First Amendment challenge and therefore affirmed the preliminary injunction. *Id.* at 239.

Notwithstanding the language of compulsion that riddles the majority opinion, it bears noting that the policy requirement does not actually "mandate," "compel," or "require" the plaintiffs to say anything at all. *Id.* at 223, 228, 230, 234-39. Rather, the policy requirement is simply "a condition on the voluntary receipt of Leadership Act funds," *id.* at 254 (Straub, J., dissenting), and the plaintiffs remain at liberty "to avoid the force of the regulations" by "simply declin[ing] the sub-

sidy," *Rust v. Sullivan*, 500 U.S. 173, 199 n.5, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). As Judge Straub observed in a lengthy and careful dissent, "[t]here is a basic difference between the denial of government funding and a direct compulsion to speak." *Alliance for Open Soc'y*, 651 F.3d at 258 (Straub, J., dissenting).

It is well established that the unconstitutional conditions doctrine provides the jurisprudential framework for analyzing government subsidy conditions. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). Although the majority engaged in a detailed discussion of the unconstitutional conditions cases, the panel decision does not rest on the unconstitutional conditions jurisprudence. Professing that the doctrine does not "neatly" capture this case, *Alliance for Open Soc'y*, 651 F.3d at 234 n.3, the majority instead relied on a purported distinction between affirmative and negative speech restrictions, *id.* at 234 ("[W]here, as here, the government seeks to affirmatively require government-preferred speech, its efforts raise serious First Amendment concerns."). But no unconstitutional conditions case has ever turned on such a distinction.[4] Indeed, in the context of protected speech, the Supreme Court has held that the "difference between compelled speech and compelled silence" is "without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

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[4] The majority implicitly acknowledges the novelty of this constitutional question by noting that "none of those [unconstitutional conditions] cases involved an affirmative speech restriction." *Alliance for Open Soc'y*, 651 F.3d at 235 n.3 (emphasis omitted).

The panel decision thus presents the exceptionally important question of whether, despite Congress's broad powers under the Spending Clause, a funding condition that imposes an affirmative speech requirement "infringes" constitutionally protected speech. *See Forum for Academic & Institutional Rights*, 547 U.S. at 59, 126 S. Ct. 1297 (internal citation and quotation marks omitted). Although the majority has vigorously denied "put[ting] . . . aside" the unconstitutional conditions doctrine in answering that question with respect to the policy requirement, *id.* at 234 n.3, it is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention.

In so holding, the panel decision "splits" from the District of Columbia Circuit, which rejected a nearly identical challenge to the Leadership Act by another grantee that refused to adopt a policy opposing prostitution. *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 477 F.3d 758 (D.C.Cir. 2007). That circuit, writing prior to the amendment of the Agency Guidelines, explained that the funding condition was permissible because "the government has not created a program to encourage private speech"—rather, "the government's own message is being delivered." *Id.* at 762 (internal citations and quotation marks omitted). Our sister circuit concluded that the Leadership Act "does not compel [the plaintiff] to advocate the government's position on prostitution and sex trafficking; it requires only that if [the plaintiff] wishes to receive funds it must communicate the message the government chooses to fund. This does not violate the First Amendment." *Id.* at 764.

By reaching the opposite conclusion with respect to the constitutionality of the funding condition, the divided Second Circuit panel has created a "circuit split," so that, as the government's petition for rehearing *en banc* observes, the statute is enforceable in some jurisdictions but not in others. *See* Pet. for Rehearing 1. This is another reason why the panel decision indisputably raises a "question[ ] of exceptional importance." Fed. R. App. P. 35(b)(1)(B) ("[A] petition [for rehearing *en banc*] may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of the other United States Courts of Appeals that have addressed the issue.").

II.

One possible argument for voting against rehearing this case is a theory that *en banc* review of a preliminary injunction is inappropriate, and that we should stay our consideration of these issues for a further appeal—one that will purportedly follow a final determination on the merits. The Supreme Court has, it is true, instructed that "[i]f the underlying constitutional question is close, . . . we should uphold the injunction and remand for trial on the merits," *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). But the majority opinion makes no reference to a "remand for trial on the merits," *id.* at 665, 124 S. Ct. 2783, and contains no decretal language to that effect. The District Court docket sheet, which was closed for administrative purposes on July 29, 2009, offers little insight as to what further proceedings, if any, are contemplated below. In the months prior to the filing of this appeal, the District Court threatened to "dismiss

this action without further notice for lack of prosecution." *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, No. 05 Civ. 8209, Doc. No. 93 (S.D.N.Y.). The last substantive entry on the District Court docket sheet is a letter from the plaintiffs dated January 6, 2010, informing the District Court of their expectation that, "following resolution of the appeal, it will be necessary to determine, at that time, *whether* to prosecute the action further in the District Court." *Id.*, Doc. No. 98 (emphasis added). On these facts, I submit that it is by no means certain that this case will return to us a third time.[5]

In any event, it is unclear how further development of the record would affect, much less alter, the decision of the panel majority that the policy requirement "falls well beyond what the Supreme Court and this Court have upheld as permissible conditions on the receipt of government funds." *Alliance for Open Soc'y*, 651 F.3d at 223.

CONCLUSION

Because this case presents a question of exceptional importance regarding the interaction of the unconstitutional conditions doctrine with an affirmative speech

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[5] Judge Pooler catechistically asserts that there will be a live and continuing controversy in the District Court following the resolution of this appeal. Indeed, we are told that any suggestion to the contrary "is simply untrue," since "[a] preliminary injunction is just that—preliminary," Pooler Op. at 134, and "[o]nce the mandate issues, it is incumbent upon the district court to revive the litigation," *id.* at 134. Whether she is right on this score remains to be seen. Much will depend upon the readiness *vel non* of the district judge to continue to pursue legal questions on which, he might well think, he has already received the authoritative instructions of the Court of Appeals.

restriction, and because that question implicates the uniform application of a federal statute, I respectfully dissent from the denial of rehearing *en banc.*

ROSEMARY S. POOLER, Circuit Judge, concurring in the denial of rehearing en banc:

I respectfully concur in the denial of the rehearing en banc. I write in response to the dissent from the denial of rehearing en banc, which adds little to Judge Straub's dissent from the panel's opinion. *Compare Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 255 (2d Cir. 2011) ("*Alliance*") (Straub, *J.*, dissenting) (declaring that "the majority puts [the unconstitutional conditions] doctrine aside and appears to conclude that when a funding condition imposes an affirmative rather than negative speech requirement, it always raises serious First Amendment concerns") (quotation marks and alteration omitted), *with* Cabranes, *J.*, Op. Dissenting from Denial of Reh'g En Banc at 5489 (announcing that it is "clear" that "the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention").

The en banc dissent oversimplifies a complicated and contentious body of law. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415-17 (1989) (describing the unconstitutional conditions doctrine as "riven with inconsistencies," "a minefield to be traversed gingerly," and in a state of "doctrinal disarray"); Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151, 175 (1996) ("[T]here is at present no well-developed doctrine setting forth the exact test to be used to evaluate viewpoint discriminatory regulations [like those at

issue in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)]"). What can be gleaned from a careful parsing of the case law is that the level of scrutiny applied to Government subsidies under the unconstitutional conditions doctrine turns on the type and scope of speech required or restricted, the speaker, whether the condition is viewpoint-discriminatory, its relationship to the Government program at issue, and other fact-specific inquiries. *See, e.g., United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("*Velazquez II*"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984); *Regan v. Taxation With Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006) ("*BLS*"); *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999) ("*Velazquez I*").

According to the dissent, plaintiffs' First Amendment claims may swiftly be rejected because they "remain at liberty 'to avoid the force of the regulations' by 'simply declin[ing] the subsidy.'" En banc dissent at 5487 (quoting *Rust*, 500 U.S. at 199 n.5, 111 S. Ct. 1759). Respectfully, and as detailed in the panel opinion, such an assertion is refuted by a careful reading of *Velazquez II*, *Rust*, *League of Women Voters*, *Regan*, *BLS*, and *Velazquez I*. The unconstitutional conditions doctrine is

messy and unsettled—so much so that the Government itself has changed its position on the question of whether the funding condition at issue is constitutional.

Nor is it surprising that our decision created a circuit split. The dissent argues that split is reason to rehear this case en banc. *See* En banc dissent at 5490. To the contrary, such an exercise would occasion a monumental expenditure of the time and resources of our Court, on an incomplete record, with precious little prospect of resolving any of the current doctrinal disarray. An *en banc* court would force us to wade into and inevitably clash over doctrines frequently in tension, including those for categorizing speakers;[1] testing the fit between a viewpoint-discriminatory regulation in the context of a "government program" against the scope of, and message advanced by, that program;[2] determining when

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[1] *See* Post at 169 ("The doctrine of unconstitutional conditions . . . lacks any mechanism for determining the domain to which speech should be allocated and hence for adequately describing the nature of the 'rights' that are to be protected."); *compare Velazquez II*, 531 U.S. at 542-43, 121 S. Ct. 1043 ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."), *with id.* at 554, 121 S. Ct. 1043 (Scalia, *J.*, dissenting) ("If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech. . . . Even respondents agree that the true speaker in *Rust* was not the government, but a doctor.") (internal quotation marks omitted) (emphasis in original).

[2] *Compare Rust*, 500 U.S. at 194, 195 n.4, 111 S. Ct. 1759 (describing prohibition on abortion counseling as condition of funding for family planning services as "a prohibition on a project grantee or its employees from engaging in *activities outside of the project's scope*" that was "*narrowly tailored* to fit Congress' intent in Title X that federal funds not be used to 'promote or advocate' abortion as a 'method of family

regulations penalizing the use of private funds must permit alternative channels for constitutionally-protected expression;[3] and assessing whether program integrity guidelines purportedly designed to provide such channels are, on their face, inadequate.[4] Even if we were

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planning' ") (emphasis added), *and Velazquez I*, 164 F.3d at 766 ("Without diminishing its potential importance to some grantees, the speech restriction in *Rust* was nonetheless very narrow."), *with Velazquez II*, 531 U.S. at 548, 121 S. Ct. 1043 ("[I]n the context of [the Legal Services Corporation Act] there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed *necessary for its legitimate objectives*.") (emphasis added), *and id.* at 547, 121 S. Ct. 1043 ("Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").

[3] *Compare League of Women Voters*, 468 U.S. at 400, 104 S. Ct. 3106 (striking down restriction on editorializing, but noting that restriction "would plainly be valid" if "Congress were to adopt a revised version of [the statute] that permitted [public radio] stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with non federal funds"), *with American Library Ass'n*, 539 U.S. at 212, 123 S. Ct. 2297 (holding that requiring libraries to install filtering software on *every* computer with Internet access if the library receives *any* discount or funds from specified federal programs "does not 'penalize' libraries that choose not to install such software" because libraries that "wish to offer unfiltered access . . . are free to do so without federal assistance"), *and Rust*, 500 U.S. at 199 n.5, 111 S. Ct. 1759 (rejecting argument that prohibition on abortion counseling penalized speech funded with non-federal money by requiring that recipients of grants help finance federally-funded projects by using matching non-federal funds).

[4] *See, e.g., Velazquez II*, 531 U.S. at 546-47, 121 S. Ct. 1043 (striking down restriction on scope of legal aid attorneys' advocacy as condition of funding because "with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict," even though the regulations at issue permitted funding recipients to establish affiliate organizations to conduct

willing and able to tackle these questions, our resolution simply could not substitute for the Supreme Court's attention. In any event, implying that this case is easy and involves a straightforward application of clear Supreme Court precedent does a disservice to the long list of judges from this and other courts who have wrestled to reconcile and correctly apply a complicated body of law.

The fact-specific nature of the inquiry makes this case particularly ill-suited to en banc consideration at this juncture, because our review here is from the grant of a preliminary injunction. Especially where, as here, the constitutional questions are both difficult and novel, they are better-resolved, in more concrete terms, after a resolution on the merits. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) (instructing that "[i]f the underlying constitutional question is close, . . . we should uphold the injunction and remand for trial on the merits."). The dissent suggests that because the panel opinion fails explicitly to "remand for a trial on the merits," the district court will simply allow the preliminary injunction to stand without further action. En banc dissent at 5490. This is simply untrue. A preliminary injunction is just that—preliminary. *See, e.g., University of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). The significant delays in prosecuting this case reflect nothing more than its complicated procedural history, including the defendants' decision mid-appeal to revise the guidelines at issue. *See Alliance for Open Soc'y Int'l*,

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litigation and other activities outside the scope of the LSC program).

Inc. v. U.S. Agency for Int'l Dev., 254 Fed. Appx. 843, 845-46 (2d Cir. 2007). Once the mandate issues, it is incumbent upon the district court to revive the litigation *See Alliance*, 651 F.3d at 239 (noting that "[b]ecause the Policy Requirement compels grantees to espouse the government's position on a controversial issue, the district court did not abuse its discretion in preliminarily enjoining its enforcement *pending a trial on the merits*") (emphasis added).

Plainly, I think the panel opinion correctly concluded that heightened scrutiny applies, and that for the reasons set forth in the panel opinion, that the Policy Requirement will likely be found to violate the First Amendment. For these reasons, I concur in the denial of rehearing en banc.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., DEFENDANTS

May 8, 2006

DECISION AND ORDER

MARRERO, District Judge.

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I. INTRODUCTION

Plaintiffs, Alliance for Open Society International ("AOSI"), Open Society Institute ("OSI") and Pathfinder International ("Pathfinder") (collectively "Plaintiffs") brought suit against defendants, the United States Agency for International Development and Andrew S. Natsios in his official capacity as its administrator (collectively "USAID"), the United States Department of Health and Human Services and Michael O.

Leavitt in his official capacity as its Secretary (collectively "HHS"), and the United States Centers for Disease Control and Prevention and Julie Louise Gerbeding in her official capacity as its Director (collectively "CDC") (and USAID, HHS and CDC collectively "Defendants," or the "Agencies," or the "Government"). Plaintiffs seek clarification of a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Act"), 22 U.S.C. §§ 7601 *et seq.* Under the Act, AOSI receives funding from USAID and Pathfinder receives funding from USAID, HHS, and CDC to administer programs authorized by the Act. OSI does not receive government funding pursuant to the Act but fears that AOSI's funding under the Act may be jeopardized by OSI's activities.

The Act forbids the Agencies from awarding funds authorized for its purposes to "any group or organization that does not have a policy explicitly opposing prostitution[.]" 22 U.S.C. § 7631(f). Plaintiffs challenge Defendants' interpretation of this provision, which Plaintiffs contend places limits on Plaintiffs' activities carried out with their private, non-government funds, and leaves Plaintiffs with no alternative avenue to express certain points of view. Plaintiffs argue that this restriction violates the First Amendment. Thus, they seek a preliminary injunction enjoining Defendants from penalizing Plaintiffs, through the withholding of Act-authorized funds or other methods, on the grounds that Plaintiffs have used their private funding to engage in activities that Defendants view as insufficiently opposed to prostitution.

II. BACKGROUND[1]

A. *FACTS*

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[1] The factual recitation below derives from the following documents. Except as specifically quoted or otherwise cited, no further reference to these documents will be made.

For Plaintiffs: Complaint, *Alliance for Open Society International, Inc. et al. v. United States Agency for International Development et al.*, No. 05 CV 8209, filed September 23, 2005 (the "Complaint"); Memorandum of Law in Support of Plaintiffs Alliance for Open Society International and Open Society Institute for a Preliminary Injunction, dated September 28, 2005 ("Pl. Mem."); Memorandum of Law in Support of Motion of Plaintiff Pathfinder International for a Preliminary Injunction, dated December 7, 2005 ("Path. Mem."); Reply Memorandum of Law in Further Support of Motion of Plaintiffs Alliance for Open Society International and Open Society Institute, and Pathfinder International for a Preliminary Injunction ("Pl. Reply"); Declaration of Burt Neuborne, dated September 22, 2005 ("Neuborne Decl."); Declaration of Rosanna Barbero, dated September 19, 2005 ("Barbero Decl."); Declaration of Chris Beyrer, MD, MPH, dated September 21, 2005 ("Beyrer Decl."); Declaration of Pedro Chequer, MD, MPH, dated August 24, 2005 ("Chequer Decl."); Declaration of Rebekah Diller, dated September 22, 2005 ("Diller Decl."); Declaration of Robert Kushen, dated September 16, 2005 ("Kushen Decl."); Declaration of Ruth W. Messinger, dated August 16, 2005 ("Messinger Decl."); Declaration of Maurice I. Middleberg, dated July 27, 2005 ("Middleberg Decl."); Declaration of Aryeh Neier, dated September 13, 2005 ("Neier Decl."); Declaration of Daniel E. Pellegrom, dated December 7, 2005 ("Pellegrom Decl."); Supplemental Declaration of Rebekah Diller, dated January 24, 2006 ("Suppl. Diller Decl."); Supplemental Declaration of Robert Kushen, dated January 24, 2006 ("Suppl. Kushen Decl."); Supplemental Declaration of Daniel E. Pellegrom, dated January 24, 2006 ("Suppl. Pellegrom Decl.").

For Defendants: Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for a Preliminary Injunction and for a Temporary Restraining Order, dated January 4, 2006 ("Def. Mem."); Declaration of Richard E. Rosberger, dated January 4, 2006 ("Rosberger Decl.").

1. *The Parties*[2]

a. *Plaintiffs*

Plaintiffs are United States-based non-profit organizations actively participating in the worldwide effort to limit the spread of HIV/AIDS. As part of this effort, they work closely with populations that have a high risk of contracting HIV/AIDS, including persons engaged in prostitution.[3]

OSI is the principal United States-based foundation established and financed by George Soros, organized under New York law, supporting a network of more than

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[2] The Court has also benefitted from the advocacy of several *amici curiae:* Untitled Memorandum of Law of *Amici Curiae* AIDS Action and Twenty-One Other Organizations, dated November 7, 2005 ("AIDS Action Mem."); Memorandum of Law of Apne Aap and Eighteen Other Organizations as *Amici Curiae*, dated December 9, 2005 ("Apne Aap Mem."); and Memorandum of Law of Proposed *Amicus Curiae* InterAction in Support of Plaintiffs' Motion for a Preliminary Injunction, dated January 30, 2006 ("InterAction Mem.").

[3] The Court notes that the terminology to be applied to the issues discussed in this opinion is a point of contention between the parties. First, while Defendants use the term "prostitute" throughout their brief, Plaintiffs have used the term "sex worker" instead. The Court will use the term "prostitute" in this opinion, as the term "sex worker" does not appear in the statute at issue. In fact, in numerous provisions, including the section here at issue, the Act explicitly uses the term "prostitution" to describe the conduct the legislation addresses. Though Plaintiffs assert that the term "sex worker" is widely used in the public health and international relief fields, some of the amici dispute this contention and take offense at the notion of a "sex" worker. Second, Defendants refer to 22 U.S.C. § 7631(f)'s requirement that fund recipients have a policy opposing prostitution as the "organizational eligibility restriction," while Plaintiffs use the term "pledge requirement" to refer to this provision. The Court will refer to § 7631(f) as the "Policy Requirement" in this opinion.

thirty "Soros Foundations" that operate worldwide (the "Open Society Network"). Each of these Soros foundations is independently established under local laws and governed by a local board of directors. OSI does not currently receive funding from Defendants under the Act.

AOSI, although closely affiliated to OSI as a member of the Open Society Network, is a legally independent non-profit organization incorporated in Delaware with offices in New York, New York and Almaty, Kazakhstan. AOSI was created in 2003 with a mission to "promote democratic governance, human rights, public health and economic, legal and social reform" in Central Asia. (Kushen Decl. at 2.) AOSI administers a program, known as the Drug Demand Reduction Program ("DDRP"), aimed at limiting the spread of injection drug use in Uzbekistan, Tajikistan, and Kyrgyzstan. It has done so with the financial support of USAID, but also with a substantial private grant of nearly $2.2 million from OSI. The DDRP is directed towards three populations: drug users, high-risk groups (*e.g.*, young people, prisoners, prostitutes, and rural-urban migrants), and the general public.

Pathfinder provides family planning and reproductive health services in twenty countries. It administers a number of programs that benefit from the financial assistance of USAID, HHS, and the CDC, including a health services project in Peru, a program to prevent mother-to-child HIV transmission in Kenya, and other global reproductive health services programs. Pathfinder also uses funding from private sources to engage in the following activities: organizing of prostitutes in India to collectively agree to engage in HIV prevention

methods, like using condoms; as well as additional outreach to promote safer sex practices, including cooperation with brothel owners and pimps.

b. *Defendants*

i. *In General*

Created by executive order in 1961, USAID is an independent agency that provides economic, development, and humanitarian assistance around the world in support of the foreign policy goals of the United States. HHS is charged with protecting the health of all Americans and providing essential human services, to those ends managing programs encompassing health and social science research, food and drug safety, Medicare and Medicaid, faith-based and community initiatives, and financial assistance for low-income families. CDC, one of the operating components of HHS, works to prevent and control infectious and chronic diseases, injuries, workplace hazards, disabilities, and environmental health threats.

ii. *In Relation to the Act*

Pursuant to Congress's policy initiative, *see* 22 U.S.C. 7603(1), the President in his State of the Union Address on January 28, 2003, announced a comprehensive, five-year global strategy to fight HIV/AIDS.[4] USAID and HHS are two of the seven primary imple-

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[4] *See* President George W. Bush, State of the Union Address (January 28, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/2003012819.html.

menting agencies of the President's Emergency Plan for AIDS Relief ("Emergency Plan").[5]

Under the Emergency Plan, both USAID and HHS implement prevention, care, and treatment programs for HIV/AIDS. USAID supports implementation through direct in-country presence and seven regional programs. HHS operates in developing countries and conducts HIV/AIDS research. As an operating component of HHS, CDC coordinates its Global AIDS Program, which assists with surveillance, training, monitoring, evaluation, and implementation of HIV/AIDS prevention, treatment, and care programs, by partnering with governments, non-governmental organizations ("NGOs"), international organizations, U.S.-based universities and the private sector. *See* Emergency Plan at 149-50.

2. *HIV/AIDS*

a. *Internationally*

In passing the Act, Congress made a number of findings as to the global status of HIV/AIDS. The Court pauses to take note of some of these findings in order to establish the larger context in which the present dispute takes place. To begin, Congress found that "HIV/AIDS has assumed pandemic proportions, spreading . . . to all corners of the world, and leaving an unprecedented path of death and devastation." 22 U.S.C. § 7601(1). At the time of enactment, approximately 65 million people worldwide had been infected with the disease, of which

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[5] *See* Office of the United States Global AIDS Coordinator, *Action Today, A Foundation for Tomorrow: Second Annual Report to Congress on the President's Emergency Plan for AIDS Relief*, at 145-54 (2006), *available at* http://www.state.gov/documents/organization/60813.pdf.

more than 25 million had died. *See id.* § 7601(2). The effects of HIV/AIDS have permeated every conceivable level of social, cultural, political, economic and geographic organization, affecting individuals, families, communities, countries, economies and continents. *See id.* §§ 7601(3)-(12). Although these statistics have undoubtedly changed since the legislation's enactment, they establish the grievous situation that Congress sought to address through the provisions of the Act.

b. *In Central Asia*

Plaintiff AOSI contends that, as a result of spillover from the drug trafficking routes that run from Afghanistan through Tajikistan, Uzbekistan, and Kyrgyzstan, Central Asia has experienced dramatic increases in HIV/AIDS rates, with public health experts fearing "the outbreak of a full-scale HIV/AIDS epidemic fueled by the exploding use of injection drugs." (Kushen Decl. ¶ 8.) Already, Central Asia "is experiencing one of the world's fastest growing rates of HIV." (Beyrer Decl. ¶ 55.)

c. *Among High—Risk Populations*

HIV/AIDS often begins its assault on a community in small, high-risk populations, such as prostitutes and injection drug users. (*See* Beyrer Decl. ¶ 2.) In enacting the statute, Congress made clear its finding that prostitution and sex trafficking are "causes and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23). Indeed, in one congressional hearing Senator Sam Brownback set forth statistics from various countries demonstrating this connection, including that "50 to 70 percent of the Burmese prostitutes in Thailand are HIV positive . . . 40 to 50 percent of the prosti-

tutes in Cambodia are HIV positive, [and] 60 percent of women prostitutes in Bombay's red light district are infected with STDs or AIDS."[6] Considerable debate persists as to how to appropriately and effectively engage members of these groups. It has been argued that preventing the spread of infection among such high-risk individuals is an important way to combat the spread of HIV/AIDS in the general population. (*See, e.g.*, Beyrer Decl. ¶ 19) ("Stigma and discrimination push people in high risk groups . . . underground, making them difficult to reach through prevention programs and thus creating more opportunities for HIV/AIDS to spread to the general population."); *see also* USAID, *Leading the Way: USAID Responds to HIV/AIDS 1997-2000* (2001), attached to Diller Decl. as Exhibit 18 ("[I]nvolving individuals from the particular target community—sex workers, for example—in delivering the message gives credibility, reduces fear and stigma, and makes it more likely that people hearing the message will follow through with specific behaviors."). Advocates for these populations and programs believe that the imposition of harsh criminal penalties for prostitution runs contrary to accepted best principles and practices of public health. (*See, e.g.*, AIDS Action Mem. at 13-21.) One country, Brazil, as one part of its comprehensive HIV/AIDS program, has adopted an approach treating prostitutes as "essential partners" in the fight against HIV/AIDS. (Chequer Decl. ¶ 6.)

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[6] *Trafficking Women and Children in East Asia and Beyond: A Review of U.S. Policy, Hearing Before the Subcomm. on East Asian and Pacific Affairs of the Comm. On Foreign Relations*, 108th Cong. 18 (2003) (statement of Senator Sam Brownback).

3. *The Act*

a. *In General*

In response to this dire situation, Congress promulgated the Act with the single overriding purpose of "strengthen[ing] United States leadership and the effectiveness of the United States response to" HIV/AIDS, tuberculosis, and malaria. 22 U.S.C. § 7603. Congress designated several avenues through which this international campaign was to run: a comprehensive, five-year strategy designed by the President; bilateral and multilateral efforts; private sector efforts; public-private partnerships; and vaccine and treatment development. *See id.* § 7603(1)-(5).

To effectuate these ends, the Act, among other strategies, establishes an HIV/AIDS Response Coordinator, *see id.* § 7612; authorizes an HIV/AIDS Working Capital Fund, *see id.* § 7612a; authorizes U.S. participation in the Global Fund to Fight AIDS, Tuberculosis, and Malaria, *see id.* § 7622; authorizes the use of funds to assist organizations in fighting HIV/AIDS, *see id.* § 7631, tuberculosis, *see id.* § 7632, and malaria, *see id.* § 7633; provides assistance for children and families, *see id.* §§ 7651-7655; and provides for consideration of expanding debt relief, *see id.* § 7681.

b. *Role of Private Partners in Combating HIV/AIDS*

Recognizing that "[n]on-governmental organizations . . . have proven effective in combating the HIV/AIDS pandemic," *id.* § 7601(18), Congress voiced its sense that "the sustainment and promotion of public-private partnerships should be a priority element of the strategy

pursued by the United States to combat the HIV/AIDS pandemic and other global health crises," *id.* § 7621(b)(1).

c. *Findings and Policies Regarding the Social and Behavioral Causes of HIV/AIDS, Particularly Prostitution*

In the Act, Congress expressed its concern with the social, cultural, and behavioral antecedents of the HIV/AIDS pandemic, determining that "[s]uccessful strategies to stem the HIV/AIDS pandemic will require . . . measures to address the social and behavioral causes of the problem." § 7601(15); *see also* § 7601(21)(C).

Congress considered prostitution to be among the behavioral causes of HIV/AIDS. *See* § 7611(a)(4) ("[T]he reduction of HIV/AIDS behavioral risks shall be a priority of all prevention efforts in terms of funding, educational messages, and activities by . . . [among other things,] eradicating prostitution, the sex trade, rape, sexual assault and sexual exploitation of women and children.").

In addition, Congress expressly found that the eradication of prostitution should be a policy of the United States:

> Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic.

§ 7601(23).

d. *The Government Funds Restriction*

The provision of the Act referred to by Plaintiffs as the "the restriction on government funds" and by Defendants as the "government funding restriction" states:

> No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

§ 7631(e) ("§ 7631(e)").

Plaintiffs do not challenge the restriction placed on government funds.

e. *The Policy Requirement*

In addition to the government funds restriction, the Act provides:

> No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

§ 7631(f) ("§ 7631(f)" or the "Policy Requirement").

It is the interpretation and implementation of this provision that is the point of contention in this case.

The final clause of this provision exempts certain recipients from the Policy Requirement. *See* § 7631(f). Some of these exempted recipients have recognized that advocacy for the reduction or removal of criminal penalties for prostitution is among the best practices in HIV prevention. (*See* Beyrer Decl. ¶ 25.)

4. *Defendants' Implementation of the Act*

a. *USAID*

i. *Acquisition and Assistance Policy Directives*

USAID initially refrained from applying the Policy Requirement to U.S.-based organizations because the Department of Justice ("DOJ") warned that such an application would be unconstitutional.[7] Specifically, USAID issued guidance stating that the government funds restriction applied to both U.S. and foreign recipients, but that the Policy Requirement required only "non-U.S. non-governmental organizations and certain Public International Organizations . . . to agree that they have a policy explicitly opposing . . . prostitution and sex trafficking." *Id.* USAID followed the DOJ's advice, issuing a policy directive omitting any requirement that U.S.-based organizations receiving funds un-

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[7] *See* USAID, *Guidance on the Definition and Use of the Child Survival and Health Programs Fund and the Global HIV/AIDS Initiative Account, FY 2004 Update*, dated July 22, 2004, attached to Diller Decl. as Exhibit 4.

der the Act have a policy explicitly opposing prostitution.[8]

Subsequently, the DOJ withdrew what it characterized as its prior "tentative advice."[9] The DOJ asserted that there are "reasonable arguments to support" the constitutionality of applying the restrictions to U.S.-based recipients. *Id.*

Following suit with the revised DOJ position, USAID changed course in June 2005, issuing a directive applying the Policy Requirement to U.S.-based recipients.[10] Under AAPD 05-04, USAID required, as a prerequisite for private organizations to receive funding under the Act, (1) a policy explicitly opposing prostitution and sex trafficking (*see id.* at 5), and (2) certification of compli-

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[8] *See* USAID, *Acquisition & Assistance Policy Directive 04-04 (Revised)—Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking* ("AAPD 04-04"), issued February 26, 2004, attached to Diller Decl. as Exhibit 2. "AAPDs . . . provide information of significance to contracting personnel including (but not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, they have been used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations." Acquisition & Assistance Policy Directives (AAPDs)/Contract Information Bulletins (CIBs) Index, USAID, at http://www.usaid.gov/business/business-opportunities/cib/ (last modified March 24, 2006).

[9] Letter from Daniel Levin, U.S. Department of Justice, to Alex Azar, II, U.S. Department of Health and Human Services, dated September 20, 2004, attached to Diller Decl. as Exhibit 7.

[10] *See* USAID, *Acquisition & Assistance Policy Directive 05-04, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003—Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking* ("AAPD 05-04"), issued June 9, 2005, attached to Rosberger Decl. as Exhibit C and to Diller Decl. as Exhibit 3.

ance with the "Prohibition on the Promotion and Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking" (*id.* at 7). This shift in position coincided with pressure exerted upon USAID and the President by members of Congress concerning the allocation of funds under the Act.[11]

ii. *Plaintiffs Seek Clarification of Requirements*

Under USAID's initial interpretation of the Act, as reflected in AAPD 04-04, AOSI was not itself subject to the Policy Requirement. *See supra* Section I.A.4.a.i. However, because AOSI partnered with non-U.S.-based organizations in administering the DDRP, it adopted the following policy:

> AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan believe that trafficking and sex work do harm both to the individuals directly involved and to others in various ways. AOSI and the Soros Foundations in Tajikistan and Kyrgyzstan do not promote or advocate such activities. Rather, our approach is to try to reduce the harms caused by disseminating

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[11] *See* Letter from U.S. Representative Mark E. Souder, Chairman of the House Committee on Government Reform's Subcommittee on Criminal Justice, Drug Policy, and Human Resources, to James Kunder, Assistant Administrator, Asia and Near East Bureau, USAID, dated October 6, 2005, attached to Suppl. Diller Decl. as Exhibit 1; Letter from U.S. Representative Mark E. Souder to Andrew Natsios, Administrator, USAID, dated December 7, 2005, attached to Suppl. Diller Decl. as Exhibit 2; Letter from Tom A. Coburn, M.D., Chairman of the Subcommittee on Federal Financial Management, Government Information, and International Security, to President George W. Bush, dated May 19, 2005, attached to Diller Decl. as Exhibit 9; Letter from U.S. Representative Mark Souder et. al., to Andrew Natsios, Administrator of USAID, dated July 15, 2005, attached to Diller Decl. as Exhibit 10.

> credible information on questions such as the prevention of disease, and by providing direct public health assistance to vulnerable populations . . .

(Kushen Decl. ¶ 23).

In a memorandum dated May 26, 2004, AOSI asked Kerry Pelzman, Regional HIV/AIDS Adviser for USAID/Central Asia, for guidance concerning its compliance with AAPD 04-04.[12] The memo stated that AOSI believed itself to be exempt from the Policy Requirement as a U.S-based organization, but sought clarification regarding funds given to non-U.S.-based subgrantees. (*Id.*) It further explained that internal principles of governance prevented AOSI from accepting funding that would restrict its speech "in a manner contrary to the values of an open society." (*Id.*) The memo recited AOSI's policy statement and requested, in writing, confirmation that it complied with AAPD 04-04.

On June 13, 2004, AOSI received a response from Pelzman via e-mail. (*See* Kushen Decl., Exhibit B, at 2-3.) The June 13 e-mail neither certified AOSI's compliance nor provided any substantive advice. (*See id.*) Accordingly, AOSI again solicited guidance from USAID. By a second e-mail to Pelzman on June 15, 2004, AOSI clarified that it was seeking advice specifically relating to the question of whether AOSI's policy satisfied the requirements of AAPD 04-04. (*See* Kushen Decl., Exhibit B, at 2 ("Our goal in sending you our policy was for AID to provide an interpretation of the AAPD and re-

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[12] *See* Memo from Robert Kushen, Chairperson of AOSI, et. al, to Kerry Pelzman, Regional HIV/AIDS Adviser for USAID/Central Asia, dated May 26, 2004, attached to Kushen Decl. as Exhibit A.

lated provisions and determine if our policy complied with the law and AID's policies.").)

In response, Belinda K. Barrington, in her capacity as Acting Regional Legal Advisor, USAID/Central Asia sent AOSI an e-mail on June 18, 2004. (*See* Kushen Decl., Exhibit B, at 1.) Barrington apparently interpreted the past correspondence between AOSI and the agency as raising a question of AOSI's ability to certify its compliance consistently with its internal governance principles. (*See id.* ("The issue was not, as your June 15th e-mail seems to suggest, whether your policy complies with the law or USAID policies, but whether AOSI is able to sign or is comfortable with signing the certification required.").) As to whether its policy was in compliance, AOSI was told that "[o]nly future actions can determine whether recipients have complied with the certification." (*Id.*)

Still uncertain as to whether AOSI's policy was in compliance, Robert Kushen, Chairperson of AOSI, arranged a meeting with USAID officials. Present at a meeting held on April 11, 2005 were Kent Hill, Acting Assistant Administrator for Global Health at USAID; Susan Pascocello, Acting Assistant General Counsel to Global Health; and various other USAID officials and AOSI staff. Plaintiffs allege that, in the course of this meeting, Hill cautioned that he could not proffer official guidance, but divulged his belief that (1) organizations that promoted the legalization of prostitution would violate the requirement and (2) organizations that limited their activities to providing health services to prostitutes would be in compliance. Plaintiffs allege that questions about the status of the universe of activities between these two poles were unanswered.

On June 9, 2005, USAID issued AAPD 05-04, shifting its prior stance and applying the Policy Requirement to both U.S.-based and non-U.S.-based organizations receiving funding under the Act. *See supra* Section II.A.4.a.i. AOSI then contacted USAID on June 13, 2005 again to reaffirm its belief that its policy complied with the requirement, emphasizing the distinction between OSI and AOSI, and highlighting the problems with an overly broad interpretation of the Act.[13]

While waiting for USAID's response, a question arose over the allocation of interim funds for the DDRP. On August 2, 2005, AOSI received a response via facsimile. (*See* Neier Decl., attached as Exhibit D.) USAID reiterated its position that "prospective determinations for private organizations about whether or not their policy statements comply with the statutory requirement reflected in AAPD 05-04" were inappropriate. (*See id.* at 1.) It outlined the contours of what a future inquiry of compliance might look like, including verification that (1) the certification had been signed, (2) certification clauses were incorporated into sub-awards, and (3) policies explicitly opposing prostitution were in place.

On August 3, 2005, AOSI received a Modification of Assistance from USAID to restart funding. (*See* Kushen Decl., attached as Exhibit C.) The Acting Executive Director of AOSI, Oksana Korneo, decided to sign the modification agreement to ensure the survival of the DDRP. (*See id.*) Once funding had been allocated, according to the complaint in this action, AOSI felt com-

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[13] *See* Letter from Aryeh Neier, President of OSI and Member of AOSI Board of Directors, to Andrew Natsios, Administrator of USAID, dated June 13, 2005, attached to Neier Decl. as Exhibit C.

fortable proceeding with the present litigation. (Compl. ¶ 67.)

Subsequent to filing suit for a preliminary injunction, AOSI received a letter from USAID in October 2005 indicating that "advocating for the legalization of prostitution" or "organizing or unionizing prostitutes for the purpose of advocating for the legalization of prostitution" will result in a finding of noncompliance.[14]

b. *HHS and the CDC*

The factual record concerning the implementation of the Act by the HHS and the CDC is considerably less complete. Plaintiff Pathfinder alleges that "in all relevant respects Defendant CDC is implementing the pledge requirement in the same manner as Defendant USAID." (Path. Mem. at 3.) Following the DOJ's change of course, *see supra* Section II.A.4.a.i, the CDC allegedly began applying the Policy Requirement to U.S.-based recipients "on or about" May 2005. (*Id.*) This shift is reflected in the cooperative agreements between Pathfinder and HHS and the CDC. Whereas earlier agreements lack the new standard provisions, which include the Policy Requirement (*see* Suppl. Pellegrom Decl., attached as Exhibits 3-5); later agreements do in fact subject Pathfinder to the Policy Requirement (*see* Pellegrom Decl., attached as Exhibits 6-9).[15]

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[14] Letter from Christopher D. Crowley, USAID Mission Director, to Galina Karmanova, AOSI, dated October 7, 2005, attached to Rosberger Decl. as Exhibit D.

[15] *See also* Expanding and Support of HIV/AIDS/STI/TB Information, Education, and Communication and Behavior Change Communication Activities in Ethiopia—Amendment, Centers for Disease Control and Prevention, 70 Fed. Reg. 29759 (May 24, 2005), attached to Rosber-

In July 2005, Pathfinder adopted the following policy to comply with the requirement:

> In order to be eligible for federal funding for HIV/AIDS, Pathfinder opposes prostitution and sex trafficking because of the harm they cause primarily to women. Pathfinder's HIV/AIDS programs seek to promote effective ways to prevent the transmission of HIV/AIDS and to reduce the suffering caused by HIV/AIDS. In order to achieve these goals, Pathfinder works with, and provides assistance and support to and for, many vulnerable groups, including women who are commercial sex workers, who, if not effectively reached by HIV/AIDS programs, will suffer and can become drivers of the HIV/AIDS epidemic.

(Pellegrom Decl. ¶ 17.)

5. *Plaintiffs' Complaint and Motions for a Preliminary Injunction*

On September 23, 2005, OSI and AOSI filed the complaint commencing this action against USAID, and moved for a preliminary injunction on September 28, 2005. The Court held a conference on October 7, 2005 at which the parties resolved to undertake to agree upon a briefing schedule and enter into a temporary "standstill" agreement, with the Government to agree that AOSI and OSI[16] could continue their activities pending the outcome of the preliminary injunction motion. Because

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ger Decl. as Exhibit E (providing that "any recipient must have a policy explicitly opposing prostitution and sex trafficking").

[16] Pathfinder had not yet been added to the case as a plaintiff, and HHS and CDC had not yet been added as defendants.

the parties were initially unable to come to an agreement, AOSI and OSI moved for a Temporary Restraining Order on October 12, 2005. Following a phone conference, the parties continued to negotiate, and entered into a stipulated agreement on October 14, 2005. The agreement provided that pending the decision on the motions for a preliminary injunction and temporary retraining order, AOSI would continue to comply with its understanding of the Policy Requirement in good faith, and USAID agreed to provide at least two weeks notice prior to taking any action to redress any perceived violation of the Act. On December 5, an amended complaint was filed adding Pathfinder as a plaintiff and HHS, Leavitt, the CDC, and Gerberding as defendants. Pathfinder thereafter filed a motion for a preliminary injunction. Its supporting brief set forth the relevant facts with regard to Pathfinder and incorporated all of the legal arguments from AOSI's and OSI's memorandum of law in support of a preliminary injunction.[17]

Plaintiffs seek a declaratory judgment that the Policy Requirement requires only that U.S-based recipients state that prostitution causes harm to women, but does not in any way restrict the activities that recipients may engage in with their private funds. In the alternative, they seek a declaratory judgment that Defendants' application of the Policy Requirement is unconstitutional.

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[17] On January 12, 2006, the Court So Ordered a stipulation entered between USAID and Pathfinder, memorializing their standstill agreement following Pathfinder's entry into the case. On the same date, the Court also So Ordered a stipulation between Pathfinder and HHS and CDC, memorializing their standstill agreement.

Plaintiffs also seek a preliminary injunction barring Defendants from (1) discontinuing funding until a ruling on the merits of this litigation, (2) unilaterally terminating the cooperative agreements, and (3) otherwise taking action solely on the ground that Plaintiffs engaged in privately-funded speech. To this end, they allege that there is a likelihood they will succeed on the merits and that they will suffer irreparable harm if the injunction is denied.

OSI claims that it will be irreparably harmed due to the uncertainty as to whether the Policy Requirement will be applied to its activities by its association with AOSI, even though it is not technically a partner in the DDRP or a recipient of federal funds pursuant to the Act. OSI emphasizes that it has already been subjected to scrutiny by some members of Congress. Accordingly, OSI claims that, absent assurances that its speech will not be imputed to AOSI, it must monitor its own speech for fear of endangering AOSI.

Section 6(e) of the cooperative agreement between AOSI and USAID provides that "any violation . . . shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term." (Suppl. Kushen Decl., attached as Exhibit 1.) AOSI claims that USAID's implementation of the Policy Requirement (1) compels the organization to engage in speech against its own will, (2) forces it to monitor its own speech and refrain from engaging in certain activities, even with its private funds, for fear of unilateral termination of government funding, and (3) violates AOSI's internal rules of governance. As an example, AOSI claims it will be chilled from fully participating in a conference in June 2006 entitled "Sexual Rights, Sexual Health: Counter-

ing the Conservative Sexual Agenda," which will include a discussion of the legal status of prostitution. (Suppl. Kushen Decl. ¶ 3.)

Pathfinder alleges that it must refrain from using its private funding in such a manner as to run afoul of a broad interpretation of the Policy Requirement. For example, Pathfinder wishes to continue using its private funds to "organize sex workers in India," to collaborate "with community organizations in Brazil that . . . have sought to change the legal regime surrounding sex work," and, more generally, to engage in a thoughtful policy debate on the appropriate legal regime for prostitution. (Path. Mem. at 5-6.) Pathfinder fears that Defendants may penalize it for such activities. *See* 45 C.F.R. §§ 74.13, 74.6, 74.62 (2006) (permitting the HHS to unilaterally terminate the award and disqualify the grantee from receiving future funding as a penalty for violating the Policy Requirement); Expanding and Support of HIV/AIDS/STI/TB Information, Education, and Communication and Behavior Change Communication Activities in Ethiopia—Amendment, Centers for Disease Control and Prevention, 70 Fed. Reg. 29760 (May 24, 2005), attached to Rosberger Decl. as Exhibit E ("Any violation of the provisions shall be grounds for unilateral termination of the agreement prior to the end of its term.").

III. APPLICABLE STANDARD FOR PRELIMINARY INJUNCTION

The Court notes at the outset that it will address only Plaintiffs' as applied challenges to Defendants' construction of the Policy Requirement. Plaintiffs state that they are bringing an as applied challenge to Defen-

dants' statutory construction of the statute, as well as challenging the constitutionality of the agency's interpretation both facially and as applied. The Court is not persuaded of the necessity to address a facial challenge to Defendants' interpretation of the statute at this early stage in the litigation and before the Agencies have undergone a review process or issued any formal guidance or regulations on the implementation of the Act and the meaning of the phrase "policy opposing prostitution." At this juncture, the Court views it as premature to look beyond the facts presented by these parties, particularly, as noted, prior to any formal statutory construction or regulatory action on the part of the Agencies. Thus the Court confines its analysis to the question of whether a preliminary injunction preventing Defendants from penalizing Plaintiffs for engaging in protected speech with their private funds should be issued pending the final outcome of this litigation.

For the Court to issue a preliminary injunction against the government, Plaintiffs must demonstrate both a likelihood of success on the merits and a threat of irreparable harm. *See, e.g., Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir. 1999) (*"Velazquez I"*). The Court will first address the requirement that Plaintiffs demonstrate a likelihood of success on the merits. In considering this question, the Court must first analyze the parties' statutory construction arguments, to determine whether or not Plaintiffs can prevail on their claims that Defendants' reading of § 7631(f), to the limited extent an interpretation or application has been articulated, is incorrect, and should be supplanted by Plaintiffs' construction pursuant to the canon of constitutional avoidance. Because the Court concludes that

Plaintiffs have not demonstrated that Defendants' statutory construction regarding certain issues central to this action is erroneous, it then turns to the question of whether Plaintiffs are likely to show that the Policy Requirement, as construed by Defendants, violates the First Amendment by restricting Plaintiffs' privately funded speech, leaving Plaintiffs with no alternative means of communicating countering viewpoints, and compelling Plaintiffs to adopt an organization-wide policy consistent with the Government's position.

IV. DISCUSSION

A. *Likelihood of Success on the Merits*

1. *Statutory Interpretation*

According to Plaintiffs, § 7631(f)'s Policy Requirement demands only a declaration that the applicant for funding under the Act generally opposes the harms caused by prostitution and that if it has complied with this condition, the organization should not lose its contract for engaging in specific activities, such as advocating for changes in the legal status of prostitution, or providing funding or technical assistance to entities that so advocate, as long as no Act funds are used for these purposes. Plaintiffs make several arguments in support of this proposition. First, they assert that the plain text compels that interpretation of the statute. Second, they argue that their construction is also supported by the purpose of the Act, as well as by legislative history. Third, they maintain that Defendants' interpretation saps other statutory provisions of meaning, including rendering § 7631(e)—the government funds restriction—superfluous. Finally, they argue that Defendants' interpretation necessarily implicates constitutional is-

sues and thus acceptance of that reading would violate the doctrine of constitutional avoidance, under which courts are to narrowly construe statutes so as to avoid conflicts with constitutional provisions. The Court will address each of these arguments in turn.

a. *Plain Meaning of the Statutory Text*

As discussed above, § 7631(f) requires organizations receiving funds under the Act to have a "policy explicitly opposing prostitution."[18] According to Plaintiffs, the word "policy," by its plain meaning, indicates that the statute requires nothing more than a general statement—a declaration of "general orientation only," regardless of the specific program activities the organization actually undertakes. (Pl. Br. at 16.) In support of this argument they proffer definitions from *Black's Law Dictionary*, the *American Heritage Dictionary of the English Language*, and Congress's use of the word "policy" elsewhere in the Act.

This argument fails, even under the definitions set forth in the dictionaries that Plaintiffs cite. As Plaintiffs themselves point out, *Black's Law Dictionary* defines "policies" as "general principles by which a government is guided." (Pl. Br. at 16) (*citing Black's Law Dictionary* 1157 (6th ed. 1990).)[19] Although Plaintiffs emphasize the words "general principles" in this definition, the

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[18] The statute also requires such organizations to have a "policy explicitly opposing . . . sex trafficking," *see* § 7631(f), but Plaintiffs are not contesting that portion of the statute.

[19] The Eighth Edition of *Black's Law Dictionary* contains the same definition: "the general principles by which a government is guided in its management of public affairs." *Black's Law Dictionary* 1196 (8th ed. 2004).

second half of the definition—"by which a government is guided"—indicates that the words "general principles" are used in context: that a policy could encompass a statement of principle, but that such statement indicates and is intended to guide an organization's *actions*. Otherwise, any policy an entity adopts—whether voluntarily or compelled, whether informally or pursuant to stated procedure—and then in practice ignores, would amount to nothing more than lofty ornamentation, an empty ceremony of words. Similarly, the definition in the *American Heritage* dictionary—a "plan *or course of action*" or "*guiding* principle"—by its terms suggests more than the lip service of a written statement. *American Heritage Dictionary of the English Language* 1401 (3d ed. 1996) (emphasis added). Conduct inconsistent with the principle would mean that the policy no longer served as a *guiding* principle.[20] The more reasonable conclusion to draw from these definitions is that a policy is not just a set of abstract disembodied words that have no bearing on or connection to an organization's conduct. Rather, the term constitutes an expression of principle that sets forth, mirrors and guides an organization's conduct along the paths of its mission and purposes. If anything, the plain text of the statute demonstrates that conforming conduct is not only necessarily interwoven

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[20] Moreover, even assuming that a policy were just a statement of principle, those same dictionary sources reveal that a "principle" is not necessarily merely a statement, but can encompass conduct, action or activity in conformity with what is stated. A "principle" is "a basic rule, law or doctrine." *Black's Law Dictionary* 1231. A "rule" is "an established and authoritative standard or principle; a general norm *mandating or guiding conduct or action* in a given type of situation," *id.* 1357 (emphasis added); a "doctrine" is "a principle, esp[ecially] a legal principle, *that is widely adhered to.*" *Id.* 518 (emphasis added).

with words but expected when issued as an organization's "policy."

Plaintiffs' argument that Congress's use of the word "policy" elsewhere in the Act reinforces their reading of the statute is unpersuasive. According to Plaintiffs, throughout the Act the term "policy" refers consistently to generalized goals, not to means used to achieve those goals, while other words, such as "project" or "program" refer to activities. Yet § 7652, to which Plaintiffs point, is not properly read this way. That section of the statute, entitled "Policy and Requirements," states, under the subsection entitled "Policy":

> The United States Government's response to the global HIV/AIDS pandemic should place high priority on the prevention of mother-to-child transmission, the care and treatment of family members and caregivers, and the care of children orphaned by AIDS. To the maximum extent possible, the United States Government should seek to leverage its funds by seeking matching contributions from the private sector, other national governments, and international organizations.

22 U.S.C. § 7652(a). The "policy" itself contains suggested conduct to which some follow-up commitment is made—such as "seek[ing] to leverage" funds and "seeking matching contributions." Section 7652(b), entitled and containing the "Requirements," simply enumerates certain mandated activities (such as "expand[ing] programs designed to care for children orphaned by AIDS") and benchmarks ("provid[ing] for meeting or exceeding the goal to reduce the rate of mother-to-child transmission of HIV by 20 percent by 2005 and by 50 percent by

2010") in conformity with the policy, but does not mean that the policy does not encompass those or other activities.

At oral argument, Plaintiffs argued that it was not their contention that they should be permitted to adopt a policy and then flout it by engaging in conduct contrary to that policy. Rather, Plaintiffs asserted that different courses of conduct (*i.e.*, different approaches to the problem) could be consistent with having a "policy opposing prostitution," and as such they vigorously contest Defendants' position that only a narrow set of actions is consistent with having a policy opposing prostitution. Thus, Plaintiffs argue, they are not seeking an interpretation of the term "policy" that is disembodied from conduct or action; instead they seek recognition that a wide array of conduct, including possibly advocating for a reduction in criminal penalties for prostitution, is consistent with having a "policy opposing prostitution."[21] The Court is not persuaded by this argument. Problematically, it leaves no room for agency interpretation of the term "policy opposing prostitution," as it would allow Plaintiffs to unilaterally designate which among various courses of conduct they view as fulfilling the provision's meaning. While Plaintiffs are correct

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[21] The term "conduct" is used throughout this section in discussing the notion that with a policy must come some course of action (or "conduct") that is related to that policy, *i.e.*, that a policy cannot stand on its own divorced from any particular course of action. Thus, conduct is not being used here to refer to, or distinguish, non-expressive activity, or activities in which speech is incidental to the conduct. On the contrary, it is clear that the activities, or conduct, at issue here (*e.g.*, advocacy for or discussion of change of the legal treatment of prostitution, outreach and education regarding sexual health and activity, organization of prostitutes) are speech-related, expressive activities.

that different courses of action can be consistent with a stated policy, and that in § 7631(f) Congress did not specify which courses of action it would view as manifesting a policy opposing prostitution, this does not mean that Congress meant that *any* conduct Plaintiffs pronounce to be consistent with such a policy is necessarily so. Again, if this were the case, the provision would be barren of meaning.

b. *Purpose of the Statute*

Plaintiffs argue that their interpretation of § 7631(f) supports the purpose of the statute. According to Plaintiffs, the overarching purpose of the Act is "to fight the spread of HIV/AIDS and other diseases." (Pl. Reply Br. at 27.) Moreover, under that view, because organizations, after issuing a statement opposing the harms caused by prostitution, remain free to choose the strategies that they deem most effective in responding to the HIV/AIDS epidemic, such a reading furthers the purpose of the Act. Plaintiffs' theory further suggests that "eradicating prostitution" is a "secondary" objective whereas the primary goal of the Act is to address HIV/AIDS. Since Plaintiffs' work seeks to combat the spread of HIV/AIDS, impeding that mission is inconsistent with the primary purpose of the Act. (*See also* AIDS Action Mem. at 5 ("[T]he pledge requirement undermines, rather than supports, the public health objectives of the AIDS Leadership Act. . . . ")).

In contrast, Defendants argue that Plaintiffs' interpretation would in fact "frustrate the Act's strategies and goals, and create an environment for risky behavior that the Act aims to prevent as part of its comprehensive

approach to fighting the spread of HIV/AIDS." (Def. Mem. at 22.)

It is clear that combating the spread of HIV/AIDS and other diseases—and making the United States a leader in this effort—is the primary goal of the Act. Indeed, as noted above, the Act expressly declares so in stating that its purpose is "to strengthen United States leadership and the effectiveness of the United States response to certain global infectious diseases [HIV/AIDS, tuberculosis and malaria]," and designating several means through which to achieve this end. 22 U.S.C. § 7603. The focus of this statement of purpose is clearly on eradicating disease; the language does not mention eradicating prostitution. Rather, the statement that it should be the policy of the United States to "eradicate" prostitution is embedded in the "Findings" section of the statute. *See id.* § 7601(23). However, Congress made several policy and strategic choices as to how it would meet its primary goal of eradicating HIV/AIDS. One of those choices, based on the finding that prostitution is a cause of HIV/AIDS, was to eradicate prostitution. Indeed, Congress specifically found that the sex industry was one of the causes of and factors in the spread of HIV/AIDS. *See id.* § 7601(23).

At minimum in light of this finding, the statute indicates that eradicating prostitution is an integral *part of* the comprehensive strategy Congress envisioned in the fight against HIV/AIDS. In the section setting forth the "Comprehensive Strategy"—which itself is described as part of the purpose of the statute, *see id.* § 7603(1)—Congress stated:

> The President shall establish a comprehensive, integrated, five-year *strategy to combat HIV/AIDS . . . Such strategy . . . shall . . . provide that the reduction of HIV/AIDS behavioral risks shall be a priority* of all prevention efforts in terms of funding, educational messages, and activities *by . . . eradicating prostitution . . .*

Id. § 7611(a)(4) (emphasis added).

Congress thus explicitly chose to include eradicating prostitution in its strategy to fight HIV/AIDS under the statute. Whether or not other approaches—such as legalizing prostitution, or reforming the sex industry through unionizing prostitutes, or other approaches advocated by Plaintiffs and other organizations—are more effective programmatic responses to HIV/AIDS, that choice among strategies was already made by Congress and unequivocally adopted in the Act. In legislating ways and means, Congress is free to choose which strategies best serve the goal to fight HIV/AIDS. In this case, Congress manifestly chose to prescribe a strategy with which at least some of Plaintiffs' program strategies are at odds.

Although, as Plaintiffs point out, Congress's finding that prostitution is "degrading to women and children and it should be the policy of the United States to eradicate such practices" is embedded among twenty-seven other congressional findings regarding a large-scale effort to prevent, treat, and eradicate HIV/AIDS, those other findings do not suggest that eradicating prostitution was not meant to be part of this large-scale effort, or that Congress was thereby making a deliberate normative choice to regard the eradication of prostitution as

a "secondary" purpose. Apropos of this issue, the Court notes the observation proffered by the AIDS Action *amici* that reducing the stigma associated with HIV/AIDS is part of how Congress described an appropriate response to the HIV/AIDS pandemic, and that forcing organizations to adopt a stance opposing prostitution could lead to more stigmatization of the very individuals these organizations are trying to help. *See* 22 U.S.C. § 7601(21)(C) ("The magnitude and scope of the HIV/AIDS crisis demands a comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic, *including . . . development and implementation of national and community-based multisector strategies that . . . increase the participation of at-risk populations in programs designed to . . . reduce the stigma associated with HIV/AIDS*") (emphasis added). Other *amici*, however, who also provide HIV/AIDS prevention services to prostitutes, argue that requiring organizations to oppose prostitution, including requiring them to oppose the legalization of prostitution, does not stigmatize prostitutes and in fact that such opposition is necessary to work effectively against the harms inflicted by prostitution, including HIV/AIDS. (*See* Apne Aap Mem. at 12-13.) Regardless of who has the better of these policy arguments, it is clear that the question as to whether opposition to prostitution does or does not necessarily involve stigmatization is at least arguable, and that Congress, by including findings addressing the problems of both HIV/AIDS and prostitution in the same statute did not view the opposition of prostitution as necessarily stigmatizing of this population.

c. *Legislative History*

Plaintiffs' key, indeed entire, piece of evidence in the legislative history arsenal is an exchange on the Senate floor between Senate Majority Leader Bill Frist and Senator Patrick Leahy. In it Senator Leahy expressed concern about the potential counterproductive consequence of the Policy Requirement insofar as it could impair the relationship of trust necessary between the organizations that help women involved in the sex industry and the victims they seek to serve, and thereby impede the effectiveness of these programs. In response, Senator Frist assured Senator Leahy that he was in agreement that the organizations who work with and on behalf of these women need to be supported in their efforts, while at the same time noting that the legislation should be careful to not condone prostitution or sex trafficking. *See* 149 Cong. Rec. S6451-01, S6457 (daily ed. May 15, 2003). Senator Frist then stated that the answer to this issue would be "to include a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women." *Id.* He further noted that "[s]uch a statement . . . would satisfy the intent of this provision." *Id.*[22]

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[22] The full text of the colloquy is set forth below:

Mr. LEAHY: Mr. President, I see the distinguished majority leader, Senator Frist, and wonder if I could ask him to address a concern I and other Senators have about a provision entitled "Limitation" which is located on page 62, line 13 of the bill.

Mr. FRIST: I would be happy to.

Mr. LEAHY: This provision says that no funds made available to carry out this act may be used to provide assistance to any group or organization that does not have a policy "explicitly opposing" prostitution and sex trafficking. On its face, this provision appears harmless. No one here supports prostitution or sex trafficking. In fact, we abhor these practices, which are demeaning and degrading towards women, and also extremely dangerous. The rate of HIV infection among prostitutes in Cambodia is estimated to be 40 percent. India is facing a similar catastrophe. It is no secret that commercial sex workers and sex trafficking are a major cause of HIV transmission in Asia and in parts of Africa. We all want to see these practices end.

But the reality is that they exist. Prostitution and sex trafficking are rampant, not only in parts of Africa and Asia, but in Eastern Europe and the former Soviet republics, the Caribbean, and parts of Latin America. Any effective strategy to combat HIV/AIDS must include programs to reduce its spread through prostitution and sex trafficking. As difficult as it is, this reality cannot be ignored.

There are organizations who work directly with commercial sex workers and women who have been the victims of trafficking, to educate them about HIV/AIDS, to counsel them to get tested, to help them escape if they are being held against their will, and to provide them with condoms to protect themselves from infection. This work is not easy. It can also be dangerous. It requires a relationship of trust between the organizations and the women who need protection.

I am concerned that this provision, which requires such organizations to explicitly oppose prostitution and sex trafficking, could impede their effectiveness. In fact, some or many of these organizations may refuse to condemn the behavior of the women whose trust they need in order to convince them to protect themselves against HIV. I would ask the Majority Leader how we can avoid that result, because we need to be able to support these organizations.

Mr. FRIST: I thank the Senator from Vermont for his question. I agree that these organizations who work with prostitutes and

According to Plaintiffs, this exchange demonstrates that Congress intended § 7631(f) to be satisfied by a simple statement from an organization that it opposes prostitution, without otherwise imposing any impediments upon that organization's activities. Under this interpretation, § 7631(f) "was simply a means for Congress to express its opposition to prostitution generally, while funding organizations that work closely with sex workers to prevent the spread of HIV/AIDS." (Pl. Reply at 30.)

There are aspects of Plaintiffs' interpretation of this exchange that appear compelling. Indeed, Senator Frist's words do seem to indicate an intent to have organizations funded under the Act retain the ability to engage in the work that they normally do, and such work could include activities that the Government is now construing as inconsistent with a policy against prostitution.

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women who are the victims of trafficking play an important role in preventing the spread of HIV/AIDS. We need to support these organizations, because HIV transmission through this type of behavior is widespread in many parts of the world. At the same time, we do not want to condone, either directly or indirectly, prostitution or sex trafficking. Both are abhorrent.

I believe the answer is to include a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women. Such a statement, as part of the contract or grant agreement, would satisfy the intent of this provision.

Mr. LEAHY: I thank the majority leader. I think that is important, because we do not want to impose requirements which have the unintended result of impeding the ability of these organizations to do their work, or interfering with our ability to support them.

149 Cong. Rec. S6451-01, S6457 (daily ed. May 15, 2003).

Yet a closer look reveals that Senator Frist's words are not inconsistent with the Government's position.

First, neither senator discusses the effect of the provision on organizations whose work includes advocating legalization or promotion of prostitution. Instead, Senator Leahy mentions other types of work organizations perform on behalf of women involved in prostitution—"educat[ing]" and "counsel[ing]," "help[ing] them escape," and "provid[ing] them with condoms"—and Senator Frist agrees that "these organizations" play an important role in preventing the spread of HIV/AIDS and should be supported. The passage does not address whether these organizations could advocate for the legalization of prostitution or, for example, unionization of prostitutes and remain consistent with a policy explicitly opposing prostitution. Second, the exchange simply does not speak to the issue of public versus private funding, and whether such organizations could retain the freedom to engage in certain activities with their own funds that they could not with federal funds.[23]

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[23] Moreover, other legislative history suggests an intent to deny funding to groups advocating for legalization of prostitution. The Policy Requirement was first added to the legislation by way of amendment during the bill's markup session in the House Committee on International Relations. Representative Christopher Smith, introducing the amendment, described his concerns regarding individuals working on HIV/AIDS prevention issues in both the government and the private sector who "feel that legalizing prostitution and focusing primarily on safe sex . . . is a solution." *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003: Markup Before the Committee on International Relations, House of Representatives*, 108th Cong. 148–49 (Apr. 2, 2003) (hereinafter "Markup Report"). Representative Smith summarized the choice to adopt his amendment as "whether or not we will provide money to organizations that seek the legalization of prostitution." *Id.* He further noted that the amendment

d. *Draining Other Provisions of Meaning*

Plaintiffs point to several other provisions of the statute and argue that their reading is necessary to prevent those other provisions from being drained of meaning or becoming superfluous. The Court finds none of these arguments persuasive.

i. *Superfluous Provisions*

Plaintiffs argue that interpreting § 7631(f)'s Policy Requirement to encompass an organization's program activities would render § 7631(e) superfluous. According to this reasoning, if § 7631(f) barred specific activities deemed to be inconsistent with a general policy stance

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did "not state that prostitutes and trafficked women should not be treated for AIDS." *Id.* Before the committee voted on the amendment, Representative Smith answered questions from another committee member, Representative Berman, about the purpose of the restriction and whether it was designed to limit the ability of an organization to provide AIDS treatment to individuals engaged in prostitution. Representative Smith responded that the purpose of the amendment was to ensure that "organizations that seek to provide that kind of assistance make it clear that they are not trying to legalize prostitution or legalize sex trafficking, which is obviously a heinous practice." *Id.*

The Court is mindful that, while markup sessions are part of the legislative history, *see Regan v. Wald*, 468 U.S. 222, 238, 104 S. Ct. 3026, 82 L. Ed. 2d 171 (1984), their weight may not be decisive, *see Becton, Dickinson & Co. v. F.D.A.*, 589 F.2d 1175, 1182 n.6 (2d Cir. 1978) (rejecting FDA's attempt to rely on markup session excerpts, because "the gap between such committee room interchanges and the intent of the legislature is generally too wide"). Nonetheless, the markup session merits mention to the extent that, at least as reflected in the recorded expressions of other members of Congress, it contradicts Plaintiffs' proposed interpretation of the Policy Requirement based only on Senator Frist's statement on the floor, and further suggests that the meaning of the Policy Requirement is not as straightforward as Plaintiffs claim.

opposing prostitution, this prohibition would necessarily encompass advocating for the legalization and practice of prostitution—including using government funds to so advocate. Thus, § 7631(e)'s ban on using government funds to promote the legalization and practice of prostitution would be rendered unnecessary, as such a ban already would be encompassed by § 7631(f). The Court rejects this reading of the statute.

Certain canons of construction counsel courts to interpret statutes in a way that avoids rendering any language superfluous, and "to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (*quoting United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 99 L. Ed. 615 (1955) (*quoting Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L. Ed. 431 (1883))) (internal quotation marks omitted); *Collazos v. United States*, 368 F.3d 190, 199 (2d Cir. 2004). At the same time, the Court is mindful that canons of construction "are not mandatory rules" that trump other evidence, reasoning and common sense. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001). Particular canons of statutory construction "'should not take precedence over more convincing reasons.'" *Krause v. Titleserv, Inc.*, 402 F.3d 119, 128 (2d Cir. 2005) (*quoting Hakala v. Deutsche Bank AG*, 343 F.3d 111, 116 (2d Cir. 2003)). Even the preference for avoiding surplusage construction "'is not absolute.'" *Id.* (*quoting Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)). For example, adopting the plain meaning of statutory language with the result that some language is superfluous is preferable to adopting an ambiguous

meaning where there is no surplusage. *See Lamie*, 540 U.S. at 536, 124 S. Ct. 1023. Similarly, other evidence of congressional intent can overcome the force of an interpretive canon. *See Chickasaw Nation*, 534 U.S. at 94, 122 S. Ct. 528.

Most relevant to this analysis, the Court notes that when construing a statute, the general preference against surplusage is constrained by the requirement that a construction avoiding surplusage must be a reasonable one. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08, 81 S. Ct. 1579, 6 L. Ed. 2d 859 (1961) ("The statute admits a *reasonable* construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy.") (emphasis added). Thus, even if the Court's reading resulted in some redundancy in the statute, such redundancy—which may simply reinforce Congress's message—would not be a reason to choose a reading that simply was not plausible. The Court has already determined, for the reasons discussed above grounded on statutory text and legislative intent, that Plaintiffs' construction of the meaning of "policy," while ostensibly designed to avoid rendering § 7631(e) superfluous, is simply not plausible.

Here, however, the Court need not worry about choosing between an interpretation that strains logic but avoids surplusage, and one that is more logical but may ostensibly contain surplusage. Instead, the Court offers two plausible readings of the statute, each of which gives effect to every clause. *See Duncan*, 533 U.S. at 174, 121 S. Ct. 2120.

First, Congress could, as a matter of policy, choose to identify one form of activity that it determines is more offensive and harmful than others, and therefore more worthy of an expression of its disapproval highlighted in a separate provision of the statute, without needing to enumerate every other activity that may be inconsistent with the legislative purpose, or foreclosing subsequent determinations of other such activities pursuant to a more general delegation of authority to the statute's administering agency. Such drafting technique is not uncommon, and is ordinarily employed in legislation that lays out either broad terms or particular priorities and leaves to the implementing agencies the task of filling in further details and proscriptions by appropriate regulations. Thus, in § 7631(e) Congress could have chosen to specify one form of activity (spending government funds for the legalization of prostitution) it deemed merited special proscription as an articulation of the significance Congress attached to barring that activity, without precluding limitations on other activities (*e.g.*, advocating for the legalization of prostitution as an organization that is acting in some capacity as a government partner in the global fight against HIV/AIDS) imposed by the more general administrative means provided in § 7631(f).

Second, § 7631(e) and § 7631(f) could be interpreted as addressing two different points in time in the grant of funds to organizations under the Act. Section 7631(f) may be viewed as providing an eligibility criterion defining which organizations qualify to apply for and receive funds, while § 7631(e) restricts specific activities for which Act funds could not be used after the grant is made, a violation of which presumably could warrant

termination of a contract. Thus, viewed temporally, § 7631(f) stands as a first cut-off in the grant-seeking process: only those organizations with a policy expressly opposing prostitution are eligible to receive contracts. The prohibition of § 7631(e) would come into play, if called for, after the organizations have been selected to receive federal funds. In other words, the provision imposes a condition on the use of those funds: that they not be expended to promote or advocate the legalization or practice of prostitution. This reading of the statute—an eligibility restriction and a funding restriction—does not render § 7631(e) superfluous and is better supported by legislative and administrative reasons than the more strained reading Plaintiffs advance.

Read in either way suggested, each provision of the statute would be given effect, although this course raises other problems. As will be discussed below, if the Policy Requirement of § 7631(f) is read as an eligibility restriction demanding that organizations adopt a policy that encompasses speech activities carried out with their private funds to qualify for receipt of federal funds, such a condition could infringe on the organizations' First Amendment rights. This issue is addressed in Section IV.A.2 of this opinion.

ii. *Other Provisions*

(a) *"Moral Objection"*

Plaintiffs also contend that the Government's reading of the Policy Requirement would undermine § 7631(d), under which organizations that are "otherwise eligible to receive assistance . . . shall not be required, as a condition of receiving the assistance, . . . to partic-

ipate in a prevention method or treatment program to which the organization has a religious or moral objection." 22 U.S.C. § 7631(d). According to Plaintiffs, since they have adopted governing principles that require them to "treat socially marginalized groups in a manner that does not marginalize them further," requiring Plaintiffs to explicitly oppose prostitution would force them to treat prostitutes in a way contrary to Plaintiffs' moral values. (*See* Pl. Mem. at 18.)

The Court is not persuaded by this argument. First, Plaintiffs do not specify how the restriction forces them to participate in a "prevention or treatment" method or how this conflicts with a "moral" value. Second, Plaintiffs' argument suggests that this provision is subject to open interpretation by all potential grantees, and that the phrase "moral value" may be given any content that Plaintiffs propose. Such a framework, however, has the potential to render the entire restriction meaningless, and thus cannot be adopted by this Court.

(b) *Palliative and Prophylactic Care*

Plaintiffs also point to an exclusion for palliative and prophylactic care in the government funding restriction: after imposing its restrictions on the use of government funds, § 7631(e) states:

> Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

22 U.S.C. § 7631(e). According to Plaintiffs, interpreting § 7631(f)'s Policy Requirement to cover specific activities of the organization could render this portion of § 7631(e) meaningless, apparently on the theory that activities within the scope of the exclusion could "evince an insufficient opposition to prostitution" and thus be barred by § 7631(f). There is nothing on the record before the Court to support such a reading of the § 7631(e) exclusion. Plaintiffs point to no statement by Defendants indicating that providing the specific types of care in question would be construed as not sufficiently opposing prostitution. Indeed, insofar as legislative history and intent with regard to this issue is not ambiguous or contradicted, the sponsor of the amendment in the markup session observed that "[i]t does not state that prostitutes and trafficked women should not be treated for AIDS" and that language elsewhere in the bill "points out that nothing in this act shall be construed to preclude the provision to individuals of palliative treatment or postexposure pharmaceuticals, including the distribution of condoms, and it goes on, in brothels and places of that sort." *Markup Report* at 149 (comments of Rep. Smith, member, House Committee on International Relations).

(c) *Specific Restriction in § 7631(e)*

Finally, Plaintiffs argue that when Congress wanted to bar particular activities in the Act, it did so explicitly. Plaintiffs point to the language in § 7631(e) expressly forbidding grant recipients from using federal money "to promote or advocate the legalization or practice of prostitution." The absence of a similarly specified set of activities in § 7631(f) indicates, according to Plaintiffs,

that Congress did not intend the Policy Requirement to encompass such activities.

The Court disagrees. As discussed above in the Court's reconciliation of § 7631(e) and § 7631(f), that Congress, in § 7631(e), specifically delineated activities prohibited with government funds, does not necessarily mean that it intended, through the absence of a similarly delineated list of activities in § 7631(f), to condone or allow for such activities. The phrase "policy expressly opposing prostitution" is broad and general. Why this phrase was left undefined is unclear: perhaps it was a legislative compromise; perhaps Congress felt the details of what this term should encompass were best left to the administering agencies to elaborate in regulations; perhaps the more general language was designed to avoid the very constitutional issues now before this Court. It is difficult to divine the congressional intent behind the absence of a more precisely contoured definition of a statutory term. However, the absence of a specifically listed activity in one section of the statute does not mean that the broad phrase "policy explicitly opposing prostitution" does not, or cannot, encompass that activity.

e. *Doctrine of Constitutional Avoidance and Deference to Agency Interpretation*

Finally, Plaintiffs argue that, pursuant to the canon of constitutional avoidance, the Court should adopt their reading of the Policy Requirement and not needlessly reach the constitutional questions potentially implicated in the case. Specifically, Plaintiffs argue that Defendants' construction of the Policy Requirement, by allowing the Government to regulate and restrict privately

funded speech and associational activities on a viewpoint discriminatory basis, impinges upon organizations' First Amendment free speech rights. Moreover, requiring organizations to adopt a policy, according to Plaintiffs, impermissibly compels speech in violation of the First Amendment. Plaintiffs urge that their construction, by allowing organizations to conduct activities as they see fit, avoids this constitutional quagmire. The Court rejects Plaintiffs' argument. To save a statute from unconstitutionality, "every *reasonable* construction must be resorted to." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) (*quoting Hooper v. California*, 155 U.S. 648, 15 S. Ct. 207, 39 L. Ed. 297 (1895)); but, as already discussed, Plaintiffs' interpretation simply is not viable or reasonable.[24]

For their part, Defendants argue that their construction of the provision should be granted deference,[25] as

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[24] The Court also notes that even requiring just a "statement" potentially raises constitutional issues regarding compelled speech, and thus that Plaintiffs' interpretation, strained though it may be, does not avoid constitutional issues.

[25] The Agencies' interpretation in this case would not be entitled to full deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), but only "some deference," since the reading and application of the statute were not subject to formal notice-and-comment procedures pursuant to the Administrative Procedure Act, but rather, set forth in ad-hoc determinations and correspondence from agency staff who may or may not even have the authority to make policy or offer administrative interpretations of the Act on behalf of any of the Agencies. *See Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) (agency's interpretation appearing only in an internal agency guideline, rather than in published regulations subject to public notice and comment was entitled to "some deference" because it was a "'permissible

they are the agencies entrusted to administer the statutory scheme. With regard to Defendants' argument, the Court finds that while their construction of the meaning of the term "policy" is not an unreasonable reading of the Act, the Court still cannot defer to the Government's interpretation of the Policy Requirement because of the significant constitutional problems, discussed at length in Section IV.A.2 of this opinion, to which such a construction gives rise. Where an agency's interpretation of a statute raises significant constitutional issues, a court need not defer to that reading absent a clear indication from Congress that such interpretation was intended. *See Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173-74, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (finding that deference was inappropriate because the agency's interpretation "invoke[d] the outer limits of Congress' power" under the Commerce Clause by "permitting federal encroachment upon a traditional state power," thus "rais[ing] significant constitutional questions" without a "clear statement from Congress" that it intended this result); *see also Miller v. Johnson*, 515 U.S. 900, 923, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) ("[W]e think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases . . . we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions."); *DeBartolo*, 485 U.S. at 574-75, 108 S. Ct. 1392.

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construction of the statute'" (*quoting Chevron*, 476 U.S. at 843, 106 S. Ct. 2224)).

Since Defendants' construction of the statute as it relates to the Policy Requirement raises significant constitutional questions—indeed, as discussed below, it goes beyond the outer limits of what the Supreme Court has found acceptable in its line of "unconstitutional conditions" cases—the Court can not defer to this interpretation. There is no clear evidence that Congress intended to restrict entirely a recipient organization's ability to express certain viewpoints, even through its privately funded activities, nor is there clear evidence of what is meant by a "policy expressly opposing prostitution." Without a clear indication of Congressional intent in this regard in the statutory text or in compelling legislative history, the Court will not conclude that Congress intended an unconstitutional result. *See Velazquez I*, 164 F.3d at 764 ("While the legislative history may give some support to the view that Congress intended to prevent grantees from creating affiliates to undertake restricted activity, the statutory text is silent on the point. We conclude that the LSC regulations are not inconsistent with or unauthorized by the terms of the Act."). The Government's interpretation of the Policy Requirement as applied to the private speech of recipients of funds under the Act, is not a constitutionally permissible construction of the statute, and the Court cannot defer to it.

Thus, in order to determine whether Plaintiffs are entitled to an injunction restraining the Defendants' interpretation of the statute, the Court turns to Plaintiffs' constitutional arguments.

2. *First Amendment Claims*

a. *Applicable Standard of Review*

Not surprisingly, since much of the resolution of this proceeding turns on which standard of review the Court should apply in reviewing the constitutionality of the statute, the parties have devoted considerable energy to their arguments concerning this question. Plaintiffs contend that the statute unduly burdens their First Amendment rights by constraining use of their private funds as a condition of receiving or maintaining federal program benefits, and thus implicates the unconstitutional conditions doctrine. Because the statute requires them to refrain from engaging in certain privately funded speech and further compels them to adopt a policy espousing a specific government formulated or endorsed viewpoint on prostitution, Plaintiffs argue that review of the statute must be subject to heightened scrutiny.

In contrast, the Government argues that the Act is an enactment pursuant to Congress's authority deriving from the Spending Clause of the Constitution, Art. I, § 8, cl. 1.1, under the jurisprudence of which the Policy Requirement does not impose any unconstitutional conditions because the Government has no obligation to subsidize the activities in question, and Plaintiffs are under no compunction to receive funds under the Act. Plaintiffs may apply for such financing, but remain at liberty to turn down any contract awarded at any time they cannot comply with the Policy Requirement. In that event, if they wish, Plaintiffs can still speak freely on approaches to prostitution or any other matter. The Government thus claims that because the statute was

enacted pursuant to Congress's spending power, it is subject to only rational basis review.

In addressing these arguments, the Court is mindful of the historical context and policy considerations that surround analysis of First Amendment issues. As the Supreme Court has observed, "[i]t is fundamental that the First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) ("*Velazquez II*") (internal quotations omitted); *c.f. United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (noting that the interest protected by the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection").

Bearing these points in mind, the Court concludes that when the government carries out its powers, including those emanating from the Spending Clause, in a manner whose substantial purpose or effect is to guide or burden choice by recipients of government benefits in the exercise of First Amendment freedoms so as to endorse the viewpoint the government favors or prescribes, such action distinguishes the case from other invocations of the Spending Clause power (*e.g.*, strictly for economic regulation) and indeed demands a heightened level of scrutiny. For the reasons set forth below, the Court is persuaded that this case falls within the unconstitutional conditions framework, and that, while the Act is undoubtedly a Spending Clause enactment, that consideration alone does not spare from heightened scrutiny the statute's imposition on Plaintiffs' First

Amendment freedoms. Before turning to its reasons for this determination, the Court will provide a brief overview of both the Spending Clause power and the unconstitutional conditions doctrine. It will then discuss the application of these doctrines to the instant case.

i. *Congress's Power Pursuant to the Spending Clause*

Under the Constitution, Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States." U.S. Const., Art. I, § 8, cl. 1.1. The Supreme Court has recognized that this provision, known as the Spending Clause, allows Congress to "attach conditions on the receipt of federal funds, and [Congress] has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987) (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980)). Congress's power pursuant to the Spending Clause is broad, and "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *Id.* at 209, 107 S. Ct. 2793. Because recipients of government funds allocated pursuant to Congress's spending power retain the ability to reject the funds offered to them, and thus not assume any restrictions attached to the funds that they deem unduly burdensome, such conditions are generally subject to less scrutiny than legislation imposing direct regulation. *See, e.g., id.* at 207, 107 S. Ct. 2793.

ii. *Overview of Unconstitutional Conditions Doctrine*

Despite the well established broad authority Congress possesses under the Spending Clause, the Supreme Court has recognized that while the government may attach conditions to financial and other benefits, there are limitations as to what these conditions may require. Succinctly framed, the doctrine holds that the government can not place conditions on its granting of public benefits or subsidies that cause the recipient to surrender vital constitutional rights, even if the government has no obligation to provide the benefit and thus could withhold it altogether. As the Court recently reiterated in *Rumsfeld v. Forum for Academic and Institutional Rights*, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." __ U.S. __, 126 S. Ct. 1297, 1307, 164 L. Ed. 2d 156 (2006) ("*FAIR*") (*quoting United States v. American Library Ass'n*, 539 U.S. 194, 210, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003)).

The Supreme Court's decision in the seminal unconstitutional conditions case, *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), embodies this principle. There, the Court held unconstitutional California's decision to deny a property tax exemption to veterans who refused to declare that they would not advocate for the overthrow of the government. *Id.* The Court found unacceptable the deterrent effect on speech that the tax provision would cause, noting that "to deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.* at 518, 78 S. Ct. 1332.

Numerous subsequent Supreme Court decisions reflect this doctrine, reiterating *Speiser*' s rejection of the contention that government may condition the acceptance of a public benefit on the curtailment of a constitutional right. In *Perry v. Sindermann*, the Court, in considering the claim of a state university professor that the university's failure to renew his contract was motivated by retaliation for his criticism of the university's governing board, noted that "even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *see also Federal Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984) (FCC not permitted to condition receipt of federal funds for public radio and television stations on the banning of editorial content in the broadcasts of those stations); *cf. Rust v. Sullivan*, 500 U.S. 173, 196, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (upholding federal government funded family planning program's restriction on abortion related speech because the regulations did not "force the [government program] grantee to give up abortion related speech [but rather] merely require that the grantee keep such activities separate and distinct from the [government program activities]").

This doctrine, while seemingly straightforward when stated in the abstract, in practice has proven difficult to apply. The Supreme Court's line of unconstitutional conditions cases has been recognized as a "troubled area

of [Supreme Court] jurisprudence in which a court ought not entangle itself unnecessarily." *Rust*, 500 U.S. at 205, 111 S. Ct. 1759 (Blackmun, J. dissenting) (*citing* Richard Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L.Rev. 4, 6 (1988) (describing this problem as "the basic structural issue that for over a hundred years has bedeviled courts and commentators alike")). The demarcation between an acceptable exercise of state power, or implementation of a selective fiscal provision pursuant to Congress's authority under the Spending Clause, and an unconstitutional condition, has proven to be a blurred and shifting line.

iii. *Determination of the Applicable Standard*

Because of the lack of clarity as to the contours of the unconstitutional conditions doctrine, both Plaintiffs and Defendants are able to summon germane authority to bolster their respective contentions with regard to the applicable standard of review. Plaintiffs, in support of their argument that the court should apply a heightened standard, point to *League of Women Voters*. There, the Supreme Court, in striking down a federal funding restriction, noted that while the government had a "substantial interest" in the legislation's purpose, the interest could be "fully satisfied by less restrictive means that are readily available." 468 U.S. at 395, 104 S. Ct. 3106. Plaintiffs also point to the Second Circuit decision in *Velazquez I*, which suggested, in dictum,[26] that even

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[26] In *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 600 (E.D. N.Y. 2004) ("*Velazquez III*"), the court suggested that the Circuit Court's adoption of the undue burden standard in *Velazquez I*, while dictum, merits close attention. Characterizing it as "judicial dictum" rather than mere "obiter dictum," *id.* at 600, the court concluded that the Circuit Court's dictum was intended to guide the lower courts and

when funding restrictions affecting private funds afford alternative avenues for expression, the restriction still must not be "unduly burdensome."[27] 164 F.3d at 767.

For their part, Defendants point to *Regan v. Taxation with Representation*, in support of their argument that a rational basis test is all that is required when analyzing restrictions on government funding benefits. *See* 461 U.S. 540, 550, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) ("It is not irrational for Congress to decide that tax-exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying."). Defendants further contend that because funding conditions are voluntarily assumed, and could be avoided entirely by simply not requesting or turning down conditioned government funds, the constraints imposed on First Amendment freedoms are considerably less demanding due to their consensual basis. Following this point, the Government argues that where Congress exercises its spending power to require that grant recipients comply with conditions imposed by federal policy, *Dole*, and its rational relationship test, provide the appropriate framework for analysis. As further support for this proposition the Government points to *American Library Association*, which applied *Dole* as the appropriate analytical framework, while noting that the challenged act did not di-

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"'must be given considerable weight and can not be ignored in the resolution of [a] close question,'" *id.* at 582 (*quoting United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975)).

[27] The Second Circuit's pronouncement, though dictum, derives support from the Supreme Court's decision in *Regan v. Taxation with Representation*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), as discussed in Section IV.A.2.a of this opinion, *infra*.

rectly regulate private activity, but rather reflected the exercise of Congress's spending power "by specifying conditions on the receipt of federal funds." 539 U.S. at 203 n. 2, 123 S. Ct. 2297.

Drawing from these cases, the Government invokes several basic principles that generally guide the determination of the appropriate standard of review in cases involving the unconstitutional conditions doctrine. Specifically, the Government asserts that deferential review is applicable here because: (1) Congress has no obligation to provide a subsidy, and if it elects to do so it may require conditions consistent with the statutory purpose—an expression of the concept that the larger power to withhold a public benefit or subsidy that is a matter of grace encompasses the lesser power to impose conditions on its acceptance; (2) the recipients of funds under the Act are entirely free to accept or reject the grants, thus compliance with the Policy Requirement does not involve any form of coercion or penalty on the exercise of the beneficiaries' First Amendment rights, nor does it entail an attempt by the Government to suppress dangerous ideas; (3) the Policy Requirement is germane to the purposes of the Act and Congress's reasons for the imposition of the condition, and consequently the Government does not thereby seek to exact a price for the surrender of protected speech.

It is the Court's task to determine where in the murky borderlands between Congress's Spending Clause power and the unconstitutional conditions doctrine the instant case lies. Confirming the muddle this Court has already noted in this area of law, another court has similarly observed that "determining the constitutionality of government subsidization of expression is one of the

most frustrating tasks of the First Amendment." *Legal Aid Society of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1412 (D. Haw. 1997) (*quoting* Martin H. Redish and Daryl Kessler, *Government Subsidies and Free Expression*, 80 Minn L.Rev. 543, 544 (1996)). That said, in the instant case the Court is persuaded that Defendants' interpretation of the statute as applied to Plaintiffs' privately funded speech activities falls squarely beyond what the Supreme Court has permitted to date as conditions of government financing.

To be sure, the multiple dimensions and articulations of the unconstitutional conditions doctrine reflect the particular principles the Government cites. But the jurisprudence also embodies other rules and guidance that weaken the force of the Government's legal theories in this regard, or render them inapt. The Court finds these considerations more compelling in determining whether a minimal or heightened standard of review applies here.

First, with regard to the point that governmental power to deny a subsidy implies the power to condition its acceptance, while undoubtedly a truism, the principle by itself falls short of the broader conception of the unconstitutional conditions doctrine that has emerged from the most recent Supreme Court jurisprudence, which is summarized below. In response to this principle, these cases implicitly embody a countervailing view central to the modern doctrine: that the government should not be permitted to do indirectly what it may not properly do directly. *See, e.g., Speiser*, 357 U.S. at 527, 78 S. Ct. 1332 (noting that the government cannot manipulate the

denial of benefits in order to "produce a result which it could not command directly").[28]

Concerning the coercion/penalty principle, certain conditions imposed on the acceptance of government grants may not appear as coercion or penalty in a strict sense of the words, in part because the concepts embody a subjective value judgment dimension that cannot readily be expressed in objective terms; nor can the quality be empirically demonstrated by the extreme intentional wrongful conduct ordinarily associated with coercion or penalties when all that is involved in the governmental action is a decision not to provide a discretionary subsidy. Absent recognized norms, distinctions between what is and is not coercive to particular individuals or in particular circumstances are often difficult to draw.[29]

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[28] Of course this point is nuanced in the context of a challenge to a Spending Clause enactment, as *Dole* explicitly provides that Congress can attempt to achieve certain ends through spending enactments that it would not be able to directly. Nonetheless, while the spending power may be broad, it is certainly not unlimited, and its constraints include the First Amendment. *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 587-90, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (stating that "the First Amendment certainly has application in the subsidy context," while noting that, pursuant to the spending power, "the Government may allocate competitive funding accordingly to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.") The continued applicability of the First Amendment, and its limitations on the Government's ability to impose restrictions on the rights it protects, was implicitly affirmed by the Supreme Court in *Velazquez II*, which struck down, without discussion of the Spending Clause or *Dole*, a restriction on federally funded speech. *See* 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63.

[29] In *Dole*, the Supreme Court acknowledged that in "some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion," while

More significant and compelling to the standard of review, however, is that, as the Supreme Court has noted, government conditions on public benefits need not be inherently coercive to constitute an impermissible burden on the exercise of constitutional liberties. *See, e.g., United States v. Jackson*, 390 U.S. 570, 583, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

Turning to the Government's germaneness argument, the principle holds that, to pass muster, attaching a government condition that burdens constitutional rights to a public benefit must bear a sufficient relationship to the interests the government would serve by denying the subsidy. *See Dole*, 483 U.S. at 207, 209, 107 S. Ct. 2793 (noting that conditions on federal funds "might be illegitimate if they are unrelated to the federal interest in particular national projects or programs" but, finding the challenged provision before it directly related to one of the main purposes of the expenditure, declining to determine "whether conditions less directly

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also recognizing that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." 483 U.S. at 211, 107 S. Ct. 2793 (*citing Steward Machine Co. v. Davis*, 301 U.S. 548, 590-91, 57 S. Ct. 883, 81 L. Ed. 1279 (1937)). As is discussed above, it is the drawing of lines between coercion and temptation that is so perplexing and subjective. *Speiser*, for example, refers to 'coercion' in describing the effect of the tax benefit provision at issue in that case. *See* 357 U.S. at 519, 78 S. Ct. 1332 (noting that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of *coercing* the claimants to refrain from the proscribed speech") (emphasis added). In *Dole*, the Court found that the spending enactment in question was not so coercive as to require invalidation because, under the enactment, a state that refused to comply with Congress's condition would lose only five percent of the funds otherwise obtainable, a condition which the Court considered to be "relatively mild encouragement." 483 U.S. at 211, 107 S. Ct. 2793.

related to the particular purpose of the expenditure might be outside the bounds of the spending power") (internal citation omitted); *National Amusements v. Town of Dedham*, 43 F.3d 731, 747 (1st Cir. 1995) (*citing* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L.Rev. 1415, 1465 (1989)). On this basis, the lesser the degree of relatedness the greater the level of scrutiny accorded to the enactment, even if the grantee were free to accept or reject the government funds. The rationale largely grounding the germaneness theory is that a condition that promotes a governmental interest unrelated to any reason that would justify denial of the public benefit is tantamount to an impermissible penalty on the exercise of a constitutional right. *C.f. Regan*, 461 U.S. at 544-45, 103 S. Ct. 1997 (upholding restriction on use of non-profit organization's tax deductible contributions for lobbying, in part because the tax code did not create situation in which charitable organizations were prevented from receiving tax deductible funds for all activities because they engaged in lobbying).

This rule as reason to guide a proper standard of review determination in this case, though a useful consideration, falls short as well. For, in essence the relatedness inquiry focuses more on the legitimacy of the governmental process that produces the challenged condition than on the systemic effect of an impermissible enactment on two larger values: the recipient's free speech rights, as well as the overarching constitutional scheme by which our society is governed. In other words, it primarily addresses the propriety of the legislative warrant for the law rather than the asserted burden on protected speech and the larger implications of an unconstitutional enactment. In emphasizing the va-

lidity of legislative reasons supporting an enactment—sometimes articulated, at other times not—this principle necessarily relaxes the starting point for constitutional inquiry, thus potentially skewing the outcome.

This analytic shortcoming is especially evident in the case of a dual-edged condition on a government benefit such as the one in contention in the case at hand. Here, it is true that the government has authorized funds for programs it is not obligated to subsidize, and that the recipients are free to take or leave this public privilege. To that extent, therefore, the issue before the Court is not the validity of a Policy Requirement as enacted and applied in general to the expenditure of public funds. More to the point is that the government seeks to extend an otherwise permissible condition to restrict activities carried out entirely with the recipient's private funds. From this perspective, the limitation would place a larger burden on some grantees, while effectively favoring others. In particular, the restriction would place at a disadvantage organizations that would not only be required to pledge to a viewpoint and to program strategies with which they may fundamentally disagree, but also potentially thereby to violate other commitments governing their private funds, and to place those resources at risk.

Accordingly, while on its face part of the hybrid condition may pass the relatedness test and thus not properly be deemed a penalty as imposed on a recipient's use of government funds, it falters and raises more far-reaching implications regarding congressional purpose when applied to inhibit activities privately financed. In the latter case the condition/benefit relationship attenuates and the restriction shades into the suspect domain

of what Supreme Court doctrine deems an impermissible penalty.

The deficiencies of the various theories the parties advance as rules of decision controlling the choice of an appropriate standard of review in this case prompts the Court to suggest another analytical approach. This construct incorporates, as appropriate, the traditional unconstitutional conditions principles described above, but places them in a larger framework of free speech rights and the role of the First Amendment in our governmental scheme. Central to this broader inquiry are several tenets. As a point of departure, freedom to enjoy preferred liberties presupposes the right to make choices about their exercise uninhibited by government duress, penalty, discrimination or other forms of undue encumbrances. At the core of this principle, standing as a fulcrum of our democracy, is the power relationship between the state and the people in American society. The government is entrusted with vast resources, with which it could exercise power to harm or to lift any member of society. In turn, the individual possesses certain constitutional rights to safeguard against abuse of the government's delegated authority and to enable enjoyment of the personal liberties constitutionally conferred on the people. Thus, in recognition of the disproportionate means bestowed on the state in our governmental plan, the First Amendment stands as a source of constitutional protections which serves to establish and maintain that power alignment between the state and its citizenry finely balanced at all times. It safeguards the individual's right to speak, by free choice, either in accordance with the government's position or in a dissonant voice.

For the so-called "marketplace of ideas" that is vital for a free society to function properly and to flourish, sustaining the people-to-government power equilibrium as constitutionally calibrated demands a number of checks long recognized in First Amendment jurisprudence. In its dealings with the individual, and in response to the legitimate private viewpoints competing in the public debate about major issues, the government should be evenhanded. It should assume a stance of neutrality as regards what people believe, and not discriminate among privately held viewpoints, nor compel its own message in a manner that unduly enhances one person and burdens another. In sum, the government should not throw its immense delegated weight into the public arena through strategies and means that improperly arrogate or shift public power, in particular when the net consequence may be to promote the government's own view at the expense of other perspectives, to distort political ties as between the state and each individual, or to upset the societal standings of particular individuals or groups relative to one another.

In this context, conditions on receipt of government funds, even if recipients remain free to accept or reject the grants, become constitutionally suspect, and demand enhanced scrutiny, if the purpose or effect of the allocation of the public resources and benefits would substantially alter choice of private speech and materially disrupt the power equilibrium of which the First Amendment functions as centerpoint. Such imbalances could occur, for example, through (1) encumbrance of the individual's ability to exercise private and independent choice in expressing private points of view, *see, e.g., League of Women Voters,* 468 U.S. at 400-01, 104 S. Ct.

3106; (2) elevation of the majority view and, conversely, suppression of minority "dangerous" ideas, *see e.g.*, *Speiser*, 357 U.S. at 519, 78 S. Ct. 1332; (3) selections among recipients of public subsidies that favor and strengthen those friendly to the government's message while placing at a disadvantage and thus weakening the opponents and skeptics. Through these means the government would give legitimacy to some while invalidating other beneficiaries. It would also enhance the value of some perspectives at the expense of others, deterring some and encouraging others by inducing compliance, effectively thereby putting a bounty on the exercise of constitutional rights. In each of these instances, the government's intervention would carry the substantial likelihood to redirect the choice of speech that a recipient might otherwise feel entirely uninhibited to make, and by the use of such inducements derived from its vast resources, to tilt the public power equilibrium to the choice of view the government elects to favor. The constitutional risks associated with any such material disruptions of the people-to-government relationship, and substantial power shifts in First Amendment values they could engender, would warrant closer scrutiny of the government action at issue.

The Supreme Court has spoken most pointedly to the unconstitutional conditions issue before this Court in terms that support the approach described above in three cases: *Regan*, *League of Women Voters*, and *Rust*. Analysis of these cases supports the conclusion that an uninhibited Spending Clause rational basis standard, as here urged by the Government, is inapt. The Government's arguments ultimately fail to adequately consider the substantial impediment the Policy Requirement im-

poses on Plaintiffs' speech with regard to their use of *non-federal* funds, in effect foreclosing for Plaintiffs any alternative channel through which to express a differing viewpoint. As underscored below, to that extent the condition would unduly disrupt the public power relationship the First Amendment seeks to maintain appropriately balanced. A careful reading of *Regan*, *League of Women Voters*, and *Rust* compels the result that, despite the broad powers Congress is granted by the Spending Clause, when a spending enactment substantially impairs First Amendment protected activity conducted by private entities with private funds as a condition of receiving a government benefit, heightened scrutiny is warranted.

In *Regan*, the Supreme Court upheld a challenge to section 501(c)(3) ("§ 501(c)(3)") of the Internal Revenue Code ("IRC"), which provided that charitable organizations engaged in lobbying could not receive tax-deductible contributions. The Court upheld the provision, applying minimal scrutiny in doing so because the provision did not reflect an attempt by Congress to invidiously discriminate in allocating its subsidies in a way designed to suppress ideas the government deems dangerous, as was the case in *Speiser*. As noted above, the Court observed that the IRC allowed § 501(c)(3) organizations to lobby the government through financially independent but affiliated organizations under § 501(c)(4), as long as records were kept to ensure that no tax deductible contributions were used for lobbying purposes. *See Regan*, 461 U.S. at 544, 103 S. Ct. 1997. In his concurring opinion, Justice Blackmun relied on the organization's ability to continue to lobby through a § 501(c)(4) affiliate in upholding the IRC provision, and noted that

without this constitutional safety valve § 501(c)(3) alone would be "constitutional[ly] defect[ive]." *Id.* at 552, 103 S. Ct. 1997.

In *League of Women Voters,* the case that Plaintiffs argue is controlling here, the Supreme Court found unconstitutional a provision denying federal funds to public broadcasting stations that engaged in editorializing. The Court found it problematic that "in contrast to the appellee in *Taxation With Representation* . . . a station [that receives only one percent of its annual income from the federal government] is not able to segregate its activities according to the source of its funding. The station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." 468 U.S. at 400, 104 S. Ct. 3106. Most apt to the circumstances of the case at hand, the Court further stated that if Congress were to adopt a revised version of the statute that permitted noncommercial stations to establish affiliate stations which could editorialize with non-federal funds, this mechanism "would plainly be valid." *Id.*

In *Rust,* recipients of family planning funds under Title X of the Public Health Services Act brought suit challenging the HHS's regulations implementing the statute. The regulations prohibited those receiving Title X funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. Also particularly germane to the instant controversy, the agency's detailed regulations, fully developed after extensive public proceedings, required that funding recipients maintain "program integrity" between facilities, personnel, and records for Title X pro-

viders and any medical providers of abortion related information or services. *Rust*, 500 U.S. at 180-81, 111 S. Ct. 1759. The Supreme Court upheld the regulations, doing so while explicitly citing as a consideration the ability of grant recipients to communicate abortion related messages through non-Title X programs. On this point, the Court stated:

> Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a healthcare organization, may receive funds from a variety of sources for a variety of purposes . . . The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project . . . The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities.

Id. at 196, 111 S. Ct. 1759 (emphasis in original). Because the grant recipients remained able to engage in "the protected conduct outside the scope of the federally funded program," the *Rust* Court found that the case was unlike *League of Women Voters*, which had foreclosed all avenues for the protected expression, and upheld the regulations. *Id.* at 197, 111 S. Ct. 1759.[30]

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[30] In *Rust*, the Court offered further elaboration on its reasoning in *Regan*, stating: [I]n *Regan* we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, we explained that such organizations remained free "to receive deductible contributions to support . . . nonlobbying activit[ies]." 461 U.S. at 545, 103 S. Ct. 1997. Thus, a charitable organization could create, under § 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(3), an affiliate to conduct its non-

Taken together, these decisions suggest that when Congress burdens the First Amendment rights of recipients of government benefits by placing restrictions on the eligibility for or use of such benefits, it must leave the recipients with adequate freedom to engage in protected expression through unregulated means. *See Velazquez I*, 164 F.3d at 766 (concluding that the inference these three cases yield is "that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels of protected expression"). Further, in each of these three rulings, there is some support for the application of heightened scrutiny when speech activities carried out with non-federal funds are restricted as a qualification for the receipt of federal funding. In *Rust*, the Court found that the challenged regulations, restricting the use of *federal funds* only, were "narrowly tailored to fit Congress's intent [that the funds] not be used to promote or advocate for abortion." *Rust*, 500 U.S. at 195 n. 4, 111 S. Ct. 1759.[31] *League of Women Voters* also ap

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lobbying activities using taxdeductible contributions, and at the same time establish, under § 501(c)(4), a separate affiliate to pursue its lobbying efforts without such contributions. 461 U.S. at 544, 103 S. Ct. 1997. *Given that alternative*, the Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity[; it] has simply chosen not to pay for [appellee's] lobbying." *Id.* at 546, 103 S. Ct. 1997 (emphasis added). *Rust*, 500 U.S. at 197-198, 111 S. Ct. 1759. This explanation of *Regan* further underscores the importance of according to recipients of a conditioned government benefit sufficient ability to engage in protected speech supported with their private funds.

[31] It is notable that in *Rust* the Court articulated a narrow tailoring test even where Congress's restrictions on speech applied only to the use of federal, and not private, funds. In addition, in the same footnote,

plied heightened scrutiny in rejecting the Government's argument that the restriction on all editorial expression was justifiable as an exercise of Congress's power pursuant to the Spending Clause. *See* 468 U.S. at 399-400, 104 S. Ct. 3106. The *League of Women Voters* Court distinguished *Regan* precisely because *Regan* allowed for an adequate alternate channel of communication. Indeed, it is significant that while *Regan* upheld the challenged tax code provision under a rational relationship standard, the restriction (no lobbying) applied only to activities paid for with government subsidized funds (those collected as tax deductible contributions). The *Regan* court found that a requirement that lobbying activities be conducted with unsubsidized contributions, through an affiliate § 501(c)(4) organization, was not "unduly burdensome." *Regan*, 461 U.S. at 544 n. 6, 103 S. Ct. 1997.

Finally, the rulings in these cases provide support to the approach of the analysis suggested above that looks to the effect of the government funding restriction on the power relationship between the state and the people that the First Amendment serves to preserve appropriately balanced. Applying the Policy Requirement to the recipients' privately funded speech activities unduly burdens organizations that may have qualms over endorsing the government's viewpoint or encounter other risks to their private use of such funds. At the same

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the Court goes on to cite *Dole* for the proposition that "Congress's power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Id.* This statement suggests that heightened scrutiny is appropriate even where funding is allocated by Congress pursuant to its spending powers as discussed in *Dole*, contrary to the Government's arguments.

time, the condition would favor organizations that conceptually supported the government's position, have no private funds to put in jeopardy or otherwise do not have the financial or programmatic strength to resist the government's inducement.

The Government, in its bid for the Court to apply a rational relationship test pursuant to a Spending Clause analysis, endeavors to distinguish these cases, asserting as well that the Supreme Court's ruling in *American Library Association* supports Defendants' claim for the application of a rational basis standard. In addition, the Government argues that because the Act involves the arena of international relations, Congress's choices are entitled to the more deferential standard of review. For the reasons stated below, the Court finds these arguments unpersuasive.

(a) *The Government Cannot Adequately Distinguish Regan, League of Women Voters, and Rust*

i. *Alternate Channels for First Amendment Activities*

There is no doubt that Congress has broad powers to determine how federal funding should be utilized. However, as *League of Women Voters* demonstrates, and *Rust* further underscores, any attempt by Congress to foreclose a grant recipient's ability to engage in certain protected conduct with its private funds should be greeted warily. *See League of Women Voters,* 468 U.S. at 400-01, 104 S. Ct. 3106; *Rust,* 500 U.S. at 196, 111 S. Ct. 1759. While the Government correctly argues that the Supreme Court did not face the question of restrictions on private spending in either *Rust* or *Regan,* and thus these decisions are not binding as to the issue at

hand, this contention does little to diffuse the support for Plaintiffs' arguments that emerges from the compelling rationale and language of these two decisions. Given that *League of Women Voters* is the only Supreme Court decision to directly address a statute in which a private organization's private spending was entirely restricted as a condition of obtaining government funding (and that the Court found such a restriction unconstitutional), the Supreme Court's reliance in both *Rust* and *Regan* on the availability of alternate channels for grant recipients' First Amendment activity as a basis for upholding the challenged provisions in each of those cases is strongly persuasive here.

ii. *The Role of NGOs*

The Government's effort to distinguish *League of Women Voters* as a unique case because the core First Amendment activity of expression of editorial opinion was implicated is also unavailing. To be sure, *League of Women Voters* did note that the expression of editorial opinion "lies at the heart" of First Amendment protection. 468 U.S. at 381, 104 S. Ct. 3106; *see also id.* at 376, 104 S. Ct. 3106 (editorial opinion entitled to "most exacting" degree of First Amendment protection). However, the instant case presents an infringement on Plaintiffs' First Amendment rights to communicate openly about matters of public concern, a right that has historically been recognized, no less so than editorial opinion, as "rest[ing] on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). While the Court recognizes the immense degree of protection that journalistic expression is granted under the First Amendment, it is unpersuaded that the

expression at stake here is of such a materially different character as to render the analysis in *League of Women Voters,* and that decision's application of heightened scrutiny, inapplicable in this case.

Indeed, the far-reaching role of NGOs in presenting issues of concern to governmental officials, as well as contributing to public debate on contested social issues, in influencing the course of public policy as well as in enhancing core public values and safeguarding them from government abuse, has always been critical to our democracy. From the beginning of the Republic to this day, as Congress itself recognized in the Act, 32 NGOs have played a significant role as partners of government in administering vital public services. They promote fuller participation and a diversity of views in civil society. They have served as advocates of public causes, as voices for the marginalized, disenfranchised and impoverished, and as counterweight to the more powerful interests in our society, both as friends and as adversaries of the government. They engage in conducting public forums to disseminate information, opinions and advice on issues before the government, a function that is critical to an informed citizenry. Quite simply, public interest groups have resources and capabilities that individuals, acting alone, do not: "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control/ Coalition for Fair Housing v. Berkeley,* 454 U.S. 290, 294, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981).

By means of these and many other functions NGOs perform, they help fundamentally in shaping the nation's public agenda. For that reason their ability to engage an "uninhibited, robust, and wide-open" public discourse

serves as an essential weight in preserving the balanced power relationship between the government and the people that the First Amendment safeguards. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The diversity and breadth of the traditional public functions NGOs contribute to our society should rank the quality of First Amendment rights and protection they merit to no lesser degree than that accorded to editorial opinion or to universities. *See, e.g., Rust*, 500 U.S. at 200, 111 S. Ct. 1759 (noting that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment") (*citing Keyishian v. Board of Regents*, 385 U.S. 589, 603, 605-06, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967)); *Claiborne Hardware Co.*, 458 U.S. at 907, 102 S. Ct. 3409 ("the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.") (*quoting Citizens Against Rent Control*, 454 U.S. at 294, 102 S. Ct. 434.)

The organizations implicated in the present case serve precisely these values. OSI, AOSI, Pathfinder, and several amici seek to cooperate with the Government in furtherance of a shared purpose: combating the devastating consequences of the HIV/AIDS pandemic. They seek to do so, however, without forfeiting the critical role they play in stimulating public discourse on controversial issues, including eminently debatable questions such as what may be the most appropriate or effec-

tive policy to engage high-risk groups in such efforts. The Policy Requirement, to the extent it prevents NGOs from speaking openly on such questions with their private funds, contravenes our national commitment open debate and our First Amendment values. *See New York Times Co.*, 376 U.S. at 270, 84 S. Ct. 710.

(b) *American Library Association Is Not Controlling*

The Government argues that the Supreme Court's ruling in *American Library Association* supports a finding that statutes enacted pursuant to the Spending Clause may impose conditions limiting grant recipients' exercise of their First Amendment rights even with private funds. In that case, the Supreme Court upheld a provision of the Children's Internet Protection Act ("CIPA") requiring libraries receiving federal funding for their internet service costs to enforce a "policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access." 47 U.S.C. § 254(h)(6)(c). *See also* 539 U.S. at 201, 123 S. Ct. 2297. The Government points to the case as an instance in which the Supreme Court applied a rational relationship test to restrictions that had application beyond the government funds themselves, and upheld the restrictions because they were sufficiently related to the objectives of the statute.

The Government's reliance on *American Library Association* is misplaced. Significantly, in the various opinions upholding the challenged act, the Supreme Court carefully took note that CIPA's requirement that Internet filtering software be applied to all funding re-

cipients' computers imposed a comparatively minimal burden on the First Amendment rights implicated in that case. The plurality opinion first observed that libraries possess the "traditional role in identifying suitable and worthwhile material [and they] are no less entitled to play that role when [they] collect materials from the Internet than when [they] collect material from any other source." *Id.* at 208, 123 S. Ct. 2297. The Court noted that most libraries exclude pornography from their print collection, and that libraries have the same ability to block access to pornographic websites. In answer to the dissent's concerns about constitutional rights that would be impinged by the unintended "over blocking" of access to speech, the plurality found that any constitutional concerns "are dispelled by the ease with which patrons may have the filtering software disabled," noting that libraries had the ability to permanently unblock erroneously blocked sites and to remove the filter to a specific site at the request of a patron. *Id.* at 209, 123 S. Ct. 2297. In his concurring opinion,[33] Justice Kennedy agreed with the upholding of the statute because there had not been any showing that adult library users' First Amendment right to access protected material would be burdened "in any significant degree," as sites could be unblocked upon request. *Id.* at 214, 123 S. Ct. 2297; *see also id.* at 220, 123 S. Ct. 2297 (Breyer, J. concurring) ("Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is

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[33] Justice Kennedy's opinion, as the narrowest majority view, is considered the controlling opinion. *See Velazquez III*, 349 F. Supp. 2d at 593-594 (*citing* standard set out in *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977)).

disproportionate when considered in relation to the Act's legitimate objectives.")[34]

Viewing *American Library Association* as evaluating a restriction that imposed a minimal burden on First Amendment rights, as it could be undone upon request, the inapplicability of the decision to the circumstances presented by the instant case becomes clear. Here, Defendants' application of the Policy Requirement to Plaintiffs is substantially more burdensome, as it requires Plaintiffs to agree to not engage, even with their private funds, in undefined forms of speech that at any moment and on any indeterminate subject the Government could interpret as being inconsistent with a "policy opposing prostitution," a limitation that Plaintiffs have demonstrated directly impinges on their First Amendment rights and substantially impairs their ability to express these ideas. This broad restriction, encumbering Plain-

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[34] In addition, the Court notes that public libraries, as government entities, hold a somewhat different position vis-a-vis the First Amendment than do NGOs. Indeed, there is a significant question as to whether a government entity may invoke the protections of the First Amendment at all. *See American Library Ass'n*, 539 U.S. at 210-11, 123 S. Ct. 2297. In *American Library Association*, the Supreme Court, while not relying on this distinction between private citizens and public entities, recognized the issue and questioned, without deciding, whether a public library could even advance a claim under the unconstitutional conditions doctrine. *See id.* at 210-12, 123 S. Ct. 2297 (finding that the filtering requirement did not impose an unconstitutional condition, "assuming . . . that public libraries have First Amendment rights"); *see also id.* (acknowledging the argument that public entities do not have First Amendment rights) (*citing Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n. 7, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973)) (Stewart, J. concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the government.").

tiffs' ability to engage in public debate on particular topics, is not comparable to the minimal burden associated with the easily lifted filter applied to library computers at issue in *American Library Association.* Indeed, the ability of library patrons to request that the filter be lifted as needed is somewhat analogous to the ability of the organizations in *Regan* and *Rust* to continue their privately financed activities with non-government funds or subsidies. Despite the need for a library patron to request on occasion that a site be unblocked, the *American Library Association* Court found that this imposition did not impose an unduly burdensome restriction on their First Amendment interests. Thus, the *American Library Association* decision, which applied the rational basis test as the appropriate standard of review, may be best explained not by the breadth of Congress's Spending Clause power but by the insubstantial degree to which the challenged provision burdened the complainants' First Amendment rights.[35]

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[35] While the Court finds that this rationale provides the most consistent analysis of these cases, it pauses to take note of a potential ambiguity arising in the *American Library Association* decision. In his dissenting opinion, Justice Stevens argues that the CIPA provision in question is an unconstitutional condition. In support of this contention, Justice Stevens points out that the provision requires that once a library has received any benefit through the specified federal programs, it must implement the filtering device on all of its computers, whether or not the computers were purchased with federal funds or were connected to the Internet through the federally funded discount Internet access programs. Thus, if a "library attempts to provide Internet service for even *one* computer through an E-rate discount, that library must put filtering software on *all* of its computers with Internet access, not just the one computer with E-rate discount." *Id.* at 230, 123 S. Ct. 2297 (Stevens, J. dissenting) (emphasis in original). In response to this point, the plurality opinion states that "CIPA does not 'penalize' libraries that choose not to install such software . . . rather, CIPA simply

(c) *The Act's Effect on International Affairs Is Not Cause for the Automatic Application of a Rational Basis Standard of Review*

The Court is also unpersuaded that the government's interest in clearly communicating its goals in the field of international relations provides a basis for applying rational basis review in the instant case. The Court recognizes that "when the government speaks in international affairs, it speaks not only with its words and its funds

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reflects Congress's decision not to subsidize their doing so." *Id.* at 212, 123 S. Ct. 2297. The plurality goes on to state: "To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance." *Id.* Upon review, the meaning of this sentence is somewhat ambiguous, as the text itself can be read to suggest either that libraries may impose the filtering device only on those computers receiving the federally discounted Internet service, while continuing to act freely with its own funds, *or* that libraries are not mandated to adhere to the filtering requirement, as they remain free to turn down federal assistance and thus continue to offer unrestricted Internet access to their patrons should they so choose. While the context of the overall opinion suggests that the sentence should be read in the latter manner, some confusion remains. If Justice Stevens is correct that the Act requires filters on computers that are connected to the Internet through means other than the federal discount programs, then the plurality's statement that "CIPA simply reflects Congress's decision not to subsidize [unfiltered Internet access]" would seem to be incorrect. That is, a provision requiring that all library computers be installed with filtering software, regardless of whether or not the computer is connected to the Internet through a means subsidized by the federal government, would extend the restriction beyond the access subsidized by Congress. In any case, even assuming that the sentence should be read to state that the Act permissibly imposes restriction on computers accessing the Internet thorough non-federally funded means, the Court would not find such language decisive. As discussed above, *American Library Association* is a plurality decision, and it is Justice Kennedy's concurring opinion, relying on the minimal burden imposed by the filtering device, that is controlling.

but also with its associations." *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 290-91 (D.C. Cir. 1989). At oral argument, the Government suggested that the Act's impact on international relations provided a basis for distinguishing this case from *Rust*, *League of Women Voters* and *Regan*, all of which indicate that Congress must leave open adequate alternative channels for communication of ideas when imposing speech related conditions on Government benefits. The Government suggested that because here, unlike in the preceding cases, the Act has ramifications for United States foreign policy efforts abroad, the Act's limitations on speech, even if such restrictions substantially impair the recipients' ability to express certain viewpoints, should be subject to only rational basis review. The Court cannot agree.

While mindful of the government's strong interest in managing the country's international relations, the Court cannot find that this interest, in this case, is sufficient to warrant the rational basis deference that the Government requests.[36] First, the Act itself does not

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[36] At the outset, the Court notes that there is a distinction between a non-justiciable foreign policy objective, and the justiciable implementation of such an objective by an agency. In this case, at this stage in the litigation, it is the agency implementation of the Act's provision that is at issue, and the enjoinment of such an interpretation pending an outcome on the merits is scope of the relief that the Court considers in this opinion. *See Planned Parenthood Fed'n of America, Inc. v. Agency for Int'l Dev.*, 915 F.2d 59, 62 (1990) (discussing procedural history in case involving agency implementation of executive branch policy, stating: "In [our previous decision] we agreed that the policy itself was not justiciable, but we reversed and directed the district court to consider on remand the legality of [the agency's] implementation of the [policy].").

suggest that the nation's foreign policy interests are the primary governmental ends driving this legislation, or that these interests require uniform policies on the part of all entities receiving funds through the Act. As is discussed at length in Section IV.A.2.b.i, below, the Act exempts from the Policy Requirement certain organizations which have in the past recognized that advocacy for the reduction of criminal penalties for prostitution are among the best practices in HIV prevention, suggesting that the Government's foreign policy interests are not undermined by association with organizations that hold such views. Finally, the Government's reliance on *DKT*, for its deference to the executive branch in the arena of foreign policy, is misplaced insofar as that case involved a challenge to a restriction on the First Amendment activities of *foreign* NGOs accepting United States government funds. *See DKT Memorial Fund*, 887 F.2d 275.

The policy challenged in that case required foreign NGOs accepting United States government grants to forego all abortion related activities, even with their private funds, but allowed domestic NGOs receiving government grants to continue to spend their private funds as they chose. To the extent that the *DKT* court did not focus on the policy's distinction between foreign and domestic NGOs in upholding the restriction, as the Government contends they did not, any suggestion in *DKT* that such a restriction would be valid if applied to domestic NGOs is dictum.[37] In addition, the Second Cir

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[37] Notably, in the section of the *DKT* opinion discussing the government's interest in selectively spending funds abroad, the arguments are limited to activities carried out with government funds. For example, the Circuit Court notes that "to hold that the government cannot make

cuit, in addressing a parallel challenge to the policy in question in *DKT*, upheld the restriction on foreign NGOs while explicitly noting that the policy did not "prohibit plaintiffs [domestic NGOs] from exercising their First Amendment rights . . . [The domestic NGOs] may use their own funds to pursue whatever abortion related activities they wish in foreign countries." *Planned Parenthood Fed'n*, 915 F.2d at 64. In the instant case, as Plaintiffs have pointed out, the restrictions at issue apply to NGOs based in the United States, restrictions which extend to these NGOs' speech within United States (for example, a conference on sexual rights and sexual health that AOSI will co-sponsor in this country in June of 2006). Defendants simply have not made an adequate showing as to why such domestic, private speech activity should be necessarily classified as a matter of American foreign policy. Taking all of these factors into consideration, the Court concludes that while the Government's increased interest in preventing its message from being distorted in the domain

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viewpoint based choices in foreign aid and foreign affairs . . . would work much mischief." 887 F.2d at 290. The Circuit Court's examples of such mischief, however, speak to burdens that could improperly be placed on *government* funds—including the argument that such a rule would expose the government's funding of an anti-apartheid initiative to unconstitutionality if the government refused to provide funding to encourage the continuance of apartheid. The opinion's relevance is also considerably narrowed because the case deals with restrictions on funding of *foreign* NGOs and speaks to the United States government's choice of foreign partners, an issue more closely related to foreign affairs than the funding of domestic organizations for their work abroad which is at issue here. *See id.* at 53 ("We observe again, that a nation speaks in foreign affairs not only by the express messages that it sends, but by its choice of *foreign entities* with whom it will associate.") (emphasis added).

of international relations abundantly demonstrates the validity of the Act's speech restriction on activities conducted with government funds, it is not sufficient to negate Plaintiffs' First Amendment rights when they act with private funds.

iv. *Statement of Standard of Review*

In light of the preceding Supreme Court precedents, which this Court finds sufficiently compelling, the Court rejects the Government's argument that rational relationship review is applicable to this case and concludes that a heightened standard of review is appropriate.[38] In applying this heightened scrutiny, the Court asks whether the restriction, as interpreted and applied by Defendants, is "narrowly tailored to fit Congress's intent." *Rust*, 500 U.S. at 195 n.4, 111 S. Ct. 1759; *see also League of Women Voters*, 468 U.S. at 395, 104 S. Ct. 3106 (noting that while the government had a "substantial interest" in the legislation's purpose, the interest could be "fully satisfied by less restrictive means that are readily available" and striking down the provision); *c.f. Velazquez I*, 164 F.3d at 766—67 (noting that while the record before the court was insufficient for facial invalidation of regulations, the rules may be subject to an as applied challenge if they "prove [to be] unduly burdensome and inadequately justified, with the result that [the Act and regulations] will suppress impermissibly the speech of certain funded organizations and their lawyers"); *Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 945 (9th Cir. 1983) (finding that ban restricting organizations receiving state funds from en-

[38] The Court views strict scrutiny as inapplicable to the instant case as the Policy Requirement is not a direct regulation on speech, but rather affects First Amendment freedoms indirectly.

gaging in abortion related activities was not narrowly tailored).

As the variance between the standards applied by the Supreme Court in *League of Women Voters* and *Rust* indicates, there is no settled articulation of the heightened standard of review in this area of law. Thus, this Court adopts *Rust'* s phrasing of the heightened standard, applying a traditional First Amendment narrow tailoring test to the challenged provision. The Court concludes that, of the relevant precedents considered, *Rust* speaks most directly to the issues of the instant case, largely because both cases involve speech regulated by Spending Clause enactments through which the government conveys a message and endeavors to compel compliance with that message by placing conditions on eligibility for government benefits.[39] Furthermore, the narrow tailoring test has been applied in analogous situations in which a regulation or statute touches on competing constitutional interests, or where there is some government justification for speech-related harm—for example, in both the commercial speech context and also in the analysis of time, place, and manner restrictions. *See, e.g., Board of Trustees, v. Fox,* 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989) (in a case involving commercial speech, requiring "a fit between the legislature's ends and the means chosen to

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[39] This aspect of both *Rust* and the instant case, insofar as they concern government spending designed to carry out a government initiative rather than to foster a variety of speech, is discussed at length in Section IV. A.2.b.ii, *infra.* For now, the Court merely notes that in *League of Women Voters,* the government was fostering speech by providing funds to broadcasters, and perhaps for this reason the slightly higher level of scrutiny articulated in that case, suggesting a least restrictive means analysis, was warranted.

accomplish those ends . . . a means narrowly tailored to achieve the desired objective"); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (upholding a National Park Service regulation challenged by protest planners as an appropriate time, place, manner regulation where it was content neutral, narrowly tailored to serve a significant government interest, and left open ample alternative channels for communication of the information).

b. *Application of Standard and Additional First Amendment Analysis*

i. *As Construed by Defendants, the Provision Is Not Narrowly Tailored to Achieve Congress's Goals*

Defendants assert that the Policy Requirement is needed to further Congress's intended aims, all deriving from the Government's goal of fighting HIV/AIDS and Congress's chosen policy of eradicating prostitution as part of its methodology to achieve this goal. In particular, the Government argues that it has an interest in not having its message (that the eradication of prostitution is part of its strategy to combat HIV/AIDS) distorted by the activities of its private partners in this fight.[40] Plaintiffs take issue with this asserted concern and the degree of the Government's interest in furthering this goal. They argue that the Government's purported interest has not been sufficiently supported with a factual

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[40] The Government's asserted interest in avoiding the perceptions of a mixed message on the part of the United States government is analyzed in detail in Section IV.A.2.b.ii, *infra*.

record.[41] Plaintiffs also contend that the primary purpose of the Act is to combat the spread of HIV/AIDS and other diseases, while the goal of the "eradication of prostitution" as a means of stemming the harms associated with prostitution is just one of twenty-eight congressional findings in the Act which together call for the prevention and treatment of HIV/AIDS. *See* 22 U.S.C. § 7601, (1)-(22), (24)-(28). Plaintiffs argue that to the extent the asserted overall goal, the fight against HIV/AIDS, is at cross purposes with the secondary goal of the eradication of prostitution, the Government has a limited interest in that secondary goal.[42]

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[41] Plaintiffs cite *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000), and *League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278, in support of two related arguments. They allege that (1) "Congress made no findings and heard no testimony regarding the undermining of its anti-prostitution message by funding recipients" and (2) Defendants have not shown "that the government's anti-prostitution message lost currency during the year and a half during which they refrained from applying the pledge requirement to U.S. organizations." (Pl. Reply at 14.) Each argument may be seen as a derivation of the more general proposition that the Government must present "more than anecdote and supposition" about the supposed harms regulated speech will cause when imposing a content-based restriction on speech. *Playboy Entm't Group*, 529 U.S. at 822, 120 S. Ct. 1878. The Court is not convinced that this point bears the same force here, as neither case involved speech regulated by Spending Clause enactments through which the government conveys a message. Since the Court finds that the exclusion provision of the Act belies the Government's assertion that the means it has chosen is narrowly tailored to achieve its interest, the Court need not further address this issue at this point.

[42] As was discussed in Section IV.A.1.b, Plaintiffs' argument that the eradication of prostitution is really only a secondary goal of the Act, is in part an attempt to do an end-run around the Act's finding that the eradication of prostitution should be the policy of the United States as it pursues the aims of the Act. In Plaintiffs' view, the goal of eradicat-

The Court declines to dwell on this debate, however, as the Government's claim that its goals will be jeopardized if the Policy Requirement is not enforced as the Government interprets it is undercut by the Act's exclusion provisions exempting certain recipients of funds under the Act from complying with § 7631(f). The text of that provision states that "this subsection shall not apply to the Global Fund to Fight Aids, Tuberculosis and Malaria, the World Health Organization ["WHO"], the International AIDS Vaccine Initiative or to any United Nations agency." 22 U.S.C. § 7631(f). As Plaintiffs point out, both the WHO and the Joint United Nations Programme on HIV/AIDS ("UNAIDS") and possibly other United Nations agencies have recognized advocacy for the reduction or removal of penalties imposed on prostitution, so that such penalties do not interfere with outreach efforts by driving this population underground, as among the best practices in HIV prevention. (Beyrer Decl. ¶ 25.) Each of these organizations receives funds pursuant to the Act. The Government has not advanced any explanation as to why a restriction on Plaintiffs' speech is necessary to protect Congress's goals in promoting uniformity of message while these high profile organizations can engage in clearly dissenting speech. The Government's purported fear of its

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ing prostitution can undermine efforts to fight HIV/AIDS because prostitutes must be empowered and enlisted in this fight, which may require actions that are at odds with a goal of immediate eradication of prostitution. Plaintiffs' argument is at base a restatement of the policy differences between Plaintiffs, who wish to preserve the right to engage in outreach to prostitutes, which can include providing supportive services to prostitutes, and the Government, which views the eradication of prostitution as one of the priorities in the fight against HIV/AIDS. As stated above, it is not the Court's role in adjudicating the instant dispute to resolve which of the parties has the better of this policy debate.

message being garbled by organizations that accept the Agencies' funds while simultaneously using their own funds to "[endorse], either implicitly or explicitly, the very practices that the program aims to eliminate" (*see* Def. Mem. at 37), is not sufficient to warrant the blanket ban on Plaintiffs' privately funded speech when the exempted organizations are free under the Act to make just such endorsements should they see fit. The exemption thus reinforces Plaintiffs' argument that the ban, as construed by Defendants, is more than is needed to protect the Government's asserted interest, and thus is not narrowly tailored.

Further, even assuming that the Government had presented significant interests in enforcing the Policy Requirement as currently construed, the Court still could not find that this construction is "narrowly tailored to fit Congress's intent." *Rust*, 500 U.S. at 195 n.4, 111 S. Ct. 1759. The current construction of the provision, requiring the Government's private partners to abstain from all speech that could be understood by the Government as supporting the decriminalization of prostitution, at this point, even absent formally adopted administrative agency definitions and regulations, amounts to a blanket ban on certain constitutionally protected speech. As such, Defendants' application of the provision is not "narrowly tailored." *See Loper v. New York City Police Dep't*, 999 F.2d 699, 705 (2d Cir. 1993) (holding that "a statute that totally prohibits begging in all public places cannot be considered 'narrowly tailored' to" achieve the prevention of the effects associated with begging); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126-27, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989) (concluding that a "total ban" on indecent in-

terstate commercial telephone messages was not narrowly tailored to protect children from exposure to indecent dial-a-porn messages); *Playboy Entm't*, 529 U.S. at 814, 120 S. Ct. 1878 ("[T]he objective of shielding children [from sexually-oriented material] does not suffice to support a blanket ban [on the transmission of such material] if the protection can be accomplished by a less restrictive alternative.").

The Court also notes the existence of other less restrictive methods of protecting the Government interests, which undermine the argument that the Act is narrowly tailored. Specifically, the Government could ensure clarity about the policies of the United States government in this area by requiring, as was the case of the regulatory scheme that the Supreme Court acknowledged as a saving grace in Rust and Regan, that government fund recipients sufficiently segregate and account for their government financed activities from those privately conducted. *See also, Velazquez I*, 164 F.3d at 766-67. Plaintiffs could also be required to issue disclaimers clarifying that particular projects and activities are privately funded and are not supported by any funds from the United States Government, a method far less restrictive than preventing Plaintiffs from engaging in any speech conveying a different viewpoint than the one advanced by the Act.[43] *See League of Women Voters*, 468 U.S. at 395, 104 S. Ct. 3106 (recognizing the Government's interest in ensuring that audiences of noncommercial stations would not be led to think that the sta-

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[43] Such disclaimers, stating in USAID agency funded publications that the views in the publication are not necessarily those of USAID, are currently required for USAID publications. *See, e.g.*, 22 C.F.R. § 226.91(c)(1).

tion's editorials reflected the view of the government, but noting that this interest could be "fully satisfied by less restrictive means that are readily available," including "simply requir[ing] public broadcasting stations to broadcast a disclaimer every time they editorialize"). These disclaimers could also be included on Plaintiffs' websites, delineating which projects are supported with the help of the Government, as well as in any written materials related to privately funded projects. The burden of providing disclaimers would be inordinately less restrictive than an indefinite ban on certain types of speech.

Even short of requiring disclaimers, the Court agrees with Plaintiffs that the Government has failed to demonstrate why the restriction on government funds is not itself adequate to prevent public confusion over its message, or why permitting grantees to refrain entirely from taking a position on prostitution would undermine the Government's message. *Cf. Reno v. American Civil Liberties Union*, 521 U.S. 844, 879, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (stating that the breadth of the challenged restriction imposed a burden on the government to explain "why a less restrictive provision would not be as effective" and finding the challenged statute not narrowly tailored "[p]articularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of [the challenged act]").

ii. *The Policy Requirement, as Construed by Defendants, Is Unconstitutional Because it Improperly Applies Its Viewpoint Discriminatory Restriction to Plaintiffs' Private Funds*

Plaintiffs additionally argue that the Policy Requirement is unconstitutional because it compels fund recipients to adopt the Government's viewpoint, and refrain from espousing any competing viewpoint even with their private funds, as a condition of receiving government funds. Defendants contend that when government legislation is aimed at the transmission of a government message, as opposed to creating a forum for increased speech from private speakers with varied viewpoints, the government may endorse one viewpoint over another, and choose to subsidize the transmittal of that particular message.

The Supreme Court has recognized that "even in the provision of subsidies, the government may not 'ai[m] at the suppression of dangerous ideas.'" *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (*quoting Regan*, 461 U.S. at 550, 103 S. Ct. 1997) (internal quotation marks omitted). In *Finley*, the Supreme Court upheld a statute requiring the National Endowment for the Arts ("NEA") to consider, as part of the criteria for evaluating grant applications, general standards of "decency and respect" for the diverse beliefs and values of the American public. *Id.* In doing so, the Court observed that the NEA's mandate was to make "aesthetic judgments" and thus it must implement an inherently content based "excellence" threshold. *Id.* at 586, 118 S. Ct. 2168. The Court noted that the case presented less of a constitutional dilemma because no facts were presented

suggesting that the NEA had denied a grant as a result of "invidious viewpoint discrimination." *Id.* at 587, 118 S. Ct. 2168. The Court went on to state that the case would be different "if the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints." *Id.* Plaintiffs argue that the Policy Requirement is precisely the sort of viewpoint based mandate that *Finley* distinguished from the provision upheld in that decision.

The Government rightly points to *Rust* and *Velazquez II* as supporting its argument that because here Congress is dispersing funds pursuant to a selective spending provision in which the government itself seeks to convey a message, it may choose to endorse one viewpoint over another. *See Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 ("We have said that viewpoint based funding decisions can be sustained . . . in . . . instances, like *Rust*, in which the government used private speakers to transmit information pertaining to its own program."); *Rust*, 500 U.S. at 193, 111 S. Ct. 1759.[44] But in *Rust*, Congress's choice to fund one viewpoint over

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[44] While the Supreme Court has thus upheld provisions that embody viewpoint based funding decisions, it bears noting that the invalidated tax provision in question in *Speiser* can arguably be viewed as a this type of restriction. *See Speiser*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460. There, veterans were required to adopt an oath that they would not advocate for the overthrow of the Government by force or violence or other unlawful means, or advocate for support of a foreign government in the event of hostilities, in order to participate in California's property tax exemption program for veterans. *Id.* at 515, 78 S. Ct. 1332. Despite that the provision was designed to ensure that the veterans endorsed the government's message, and thus reflected a "viewpoint based funding decision[ ]," *Rust*, 500 U.S. at 193, 111 S. Ct. 1759, aimed at using private speakers to convey a government message, the Court struck down the oath requirement. *Id.* at 513, 78 S. Ct. 1332.

another extended only to the use of *federal* funds. And although *Velazquez II* expounds upon the government's ability to selectively fund certain viewpoints and not others, the Court there struck down a funding restriction which prevented *federal* funds from being used to bring suits questioning the validity of existing welfare laws. The Court in *Velazquez II* distinguished *Rust* in order to strike down a restrictive funding provision. Thus, even accepting the Government's reading of *Velazquez II* and *Rust* and the proposition that the subsidies in this case are aimed at conveying a government message as opposed to fostering speech, the fact remains that neither *Rust* nor *Velazquez II* speaks to the issue before this Court: whether the government may condition the grant of its funds on a requirement that recipients adopt its message and refrain from engaging in any activities that might be deemed supportive of any competing viewpoint even with its *private* funds.

Indeed, the *Rust* Court stated that Congress can "selectively fund a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193, 111 S. Ct. 1759. Here, however, Plaintiffs do not seek funding for the dissemination of viewpoints contrary to the Government's own program. They do not contest, as the plaintiffs did in *Rust*, the viewpoint-based restrictions imposed on activities conducted with government funds. Rather, they seek only to use their private funds to consider and pursue "alternative program[s] which [seek] to deal with the problem in another way." *Id.* This distinction is of paramount importance.

Defendants claim that the unprecedented degree of government restriction on competing viewpoints imposed by the Policy Requirement is warranted because of the broad scope of the government message that the Act conveys. The Government argues that because the Act sets forth a congressional policy of "eradicating prostitution, the sex trade, rape, sexual assault, and sexual exploitation of women and children," 22 U.S.C. § 7611(a)(4), the Policy Requirement is necessary to ensure that the government aim, and its message, are not undermined by the privately funded activities of Plaintiffs. The Government points out that "when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Velazquez II*, 531 U.S. at 541, 121 S. Ct. 1043 (internal quotation omitted).

The Government's argument would, upon first review, appear to be answered by *Rust*, the very precedent which it advances in support of its position, as there the Court upheld a viewpoint discriminatory funding requirement in part because the regulations implementing the funding restriction allowed for adequate alternative channels of communication, which the Policy Requirement, as currently construed, does not. But the Government argues that the instant case is distinguishable from *Rust* in that here the government's asserted policy aim—the eradication of prostitution—is broader than the goal advanced by the funding program in *Rust*.

In *Rust*, the Title X family planning program at issue was limited to pre-conception care, with abortion falling outside the scope of the federally funded program, and thus allowing Title X grant recipients to continue to of-

fer abortion related services with their private funds was not inconsistent with the government program's goals. The Government contends that this is in stark contrast to the program at issue here, where the government has articulated the eradication of prostitution as one of its strategies to fight HIV/AIDS. *See* 22 U.S.C. § 7611(a)(4). Thus, the Government's argument goes, to allow grant recipients to advocate, even with their private funds, for decriminalization, unionization or tolerance of prostitution is inconsistent with the program goals of the Act to a greater extent than was the case in *Rust*.[45]

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[45] The Court finds it noteworthy that the Government's asserted interest in eradicating prostitution may not be entirely inconsistent, or at least not as inconsistent as Defendants suggests, with Plaintiffs' aims of reaching out to and empowering prostitutes in the fight against HIV/AIDS. In the supporting documents and exhibits submitted to the Court, there is mention of at least one program that, though involving the engagement of the prostitution community, ultimately had the effect of reducing prostitution overall in the region in which the program operated. The Sonagachi Project in Calcutta, India not only helped produce low rates of HIV infection among prostitutes, but also contributed to a decrease in prostitution as economic and social barriers to exiting the sex industry were eased. (See Beyrer Decl. ¶ 42.) While the Sonagachi Project did not, at least insofar as this Court is aware, go as far as to advocate for the legalization of prostitution, it did provide prostitutes with a number of supportive services (e.g., adult literacy programs, loan assistance, group training sessions, and informal daily meetings in the "red light" districts), activities sufficiently supportive of prostitution to engender the criticism of Representative Mark Souder and twenty-eight other Members of Congress in a letter to USAID, characterizing the project as "pro-prostitution." (Letter from U.S. Representative Mark Souder et. al., to Andrew Natsios, Administrator of USAID, dated July 15, 2005, attached to Diller Decl. as Exhibit 10.) The Court highlights this example to point out that, to the extent the Government advances its interest in the eradication of prostitution as a justification for its interpretation of the Policy Require-

While the Government's argument is commendably creative, the Court cannot credit it as justifying the Policy Requirement's restriction on private funds. The plain fact is that in *Rust*, the regulations the Supreme Court upheld were designed to address precisely the same kind of mixed message concern that the Government complains of here. In *Rust*, the Secretary of Health and Human Services defended the "program integrity" regulations, which provided for the separation of the government funded Title X project from privately funded projects engaged in *by the same organization* involving abortion related services, as necessary to assure that "grantees avoid creating the appearance that the Government is supporting abortion related activities." *See Rust*, 500 U.S. at 188, 111 S. Ct. 1759 (noting that "the program integrity regulations were promulgated in direct response to the observations in the GAO and OIG reports that because the distinction between the recipients' Title X and other activities may not be easily recognized, the public can get the impression that Federal funds are being improperly used for abortion activities") (internal quotation and citation omitted). The regulation was thus specifically promulgated to address the potential for the same mixed message concern that is proffered by the Government here. While the Supreme Court found this concern sufficient to restrict the grant recipients' speech with regard to their federal funds, it explicitly relied on the existence of adequate channels of alternate communication for the grant recipients in doing so. *See id.* at 196-97, 111 S. Ct. 1759. The

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ment, it is arguable, as Plaintiffs note, that activities supportive of prostitutes themselves, and conceivably facilitating prostitution in the short term, may indeed in the long run serve Congress's goal of eradication of prostitution.

Government's effort to extend *Rust* to allow for viewpoint based speech restrictions on grant recipients' private funds on the basis of concerns about a mixed message goes beyond what has been permitted in any of the Supreme Court unconstitutional conditions cases addressing this issue.[46] *See id.* at 173, 111 S. Ct. 1759; *League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278; *Regan*, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129.

Even if the Court found this argument persuasive, it would still decline to allow the government to impose the viewpoint based restriction at issue in this case, as the

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[46] The rationale proposed by the Government is problematic because it has no inherent limits and presumably could be manipulated to allow for almost any viewpoint based restriction—simply through the crafting of a sufficiently broad "government message." As was recognized in *Velazquez II*, "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." 531 U.S. at 547, 121 S. Ct. 1043. Furthermore, the Court does not agree with the notion that government contractors running potentially competing government and non-government programs necessarily detracts from the government's interests or messages. Indeed, this is not uncommon among those who work for and with the government. For example, pursuant to the President's charitable initiative for faith-based organizations, such organizations may use federal funds to provide services and assistance to those in need, but "organizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance," though the organizations remain free to engage in these activities and types of speech when acting without federal assistance. *See* Presidential Executive Order No. 13279, 67 Fed. Reg. 77141 (Dec. 12, 2002). A second example arises with defense contractors, who routinely provide services to the United States Armed Services while at the same time working for potentially competing nations.

Government's arguments are deeply undercut by the Act's provisions excepting certain organizations from the Policy Requirement. As these carve out provisions, and the way in which they undermine the government's asserted interests, have already been discussed in Section IV.A.2.b.i, the Court will not detail again this point here. It is sufficient to say that the government's purported interest in the sanctity of its message cannot bear the weight of banning Plaintiffs' privately funded speech when specifically exempted organizations, without any justification offered, are free to maintain and express any policy they wish, or no policy at all, while accepting funds under the Act.

iii. *The Act Unconstitutionally Compels Speech*

Furthermore, the Government's viewpoint based restriction is even more offensive to the First Amendment as it improperly compels speech by affirmatively requiring Plaintiffs to adopt a policy espousing the government's preferred message. The Government defends this component of the requirement by again pointing to Congress's power pursuant to the Spending Clause, arguing that Plaintiffs cannot claim to be compelled as they are free to turn down the funds. The Government's response is another variation on its contention, relied on throughout its papers, that because the Act's restrictions on First Amendment freedoms reach Plaintiffs only if they choose to accept federal funds, such restrictions may be as broad and far-reaching as the government desires. This somewhat cavalier take-it-or-leave-it answer to an infringement of speech—which can more or less be characterized as "if you don't like it, lump it"—is simply not in keeping with the expectations our society derives from First Amendment freedoms and how gov-

ernment would respond to their invocation. The Supreme Court has repeatedly found that speech, or an agreement not to speak, cannot be compelled or coerced as a condition of participation in a government program. Whether the government is acting as an employer, a contractor, a patron, or in offering tax exemptions or public services, the principle remains the same: the government's ability to condition participation in its programs by the beneficiaries' relinquishment of constitutional protections is far from limitless. *See, e.g., Perry*, 408 U.S. at 597, 92 S. Ct. 2694 (state, acting as employer, cannot condition teaching position upon refraining from public or private criticism of college administration's policies); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 725-26, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996) (while the government, as contractor, may terminate at-will relationships without cause, "it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views"); *Speiser*, 357 U.S. at 518, 78 S. Ct. 1332 (rejecting the argument that because tax exemptions may be characterized as "privileges," they cannot constitute infringements of free speech); *see also Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (finding unconstitutional a requirement that drivers use license plate bearing state motto in order to use roadways); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (state could not compel schoolchildren to participate in flag salute and pledge as a condition of receiving access to public education).

The Government argues that these cases are inapposite as none of them involve a selective spending pro-

gram in which Congress "simply designed a limited program to expend government funds for a particular purpose." (*See* Def. Mem. at 35.) Admittedly, the compelled speech cases discussed do not concern Spending Clause enactments. Nonetheless, that the Policy Requirement at issue here arises out of a Spending Clause enactment, and thus is not a direct regulation of speech, is not enough to distinguish it from the overriding principle that emerges from these cases: that the government cannot compel speech in exchange for participation in a government program, even a program to which there is no direct entitlement. *Cf. FAIR*, 126 S. Ct. at 1308 (in upholding the Solomon Amendment's requirement that universities provide military recruiters equal access to campus as a condition of receiving government funding, the Court found that the funding provision compelled conduct as opposed to speech, while noting that "there is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse"). While it is also true that Plaintiffs can turn down the funds and avoid the compelled speech, this option is not sufficient to cure the heavy burden imposed by the Policy Requirement, especially because the provision extends to Plaintiffs' entire organizations.[47] The requirement essentially enlists the government's private partners to convey the government's message and renders these organizations, on this particular issue, de facto mouthpieces for its view. *Cf. Wooley*, 430 U.S. at 715-17,

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[47] In addition, Plaintiffs have asserted that they face strict penalties if they are found to violate the Policy Requirement, as the Defendant agencies retain the ability to unilaterally terminate their contracts, permanently disqualify them from receiving future funding, or even seek a refund of money already disbursed. (*See* Pl. Mem. at 22 n.21; Pl. Reply at 19 n. 12.)

97 S. Ct. 1428 (striking down a state provision that effectively forces an individual "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable" and noting that "where the state's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message"). The outcome for which the Government advocates would result in a potentially troublesome government funding arena, one in which the government would have the unmitigated ability to wield its spending power to play favorites, as described above, by supporting and thereby strengthening only those NGOs, entities, and individuals that convey messages supportive of the government's viewpoint, while placing at a disadvantage, and potentially weakening, those that decline to endorse the government's message. Insofar as the government engages in this form of viewpoint favoritism among significant players in the public debate of vital issues, whether by coercion or by inducements available only to those who would agree with the government's line, the practice would tend to offset the delicate balance of the power relationship between the government and the public that the First Amendment works to calibrate.

3. *AOSI and Pathfinder Have Demonstrated a Likelihood of Success on Their Constitutional Claims*

Because the provision as construed by Defendants cannot survive heightened scrutiny, and also impermissibly discriminates based on viewpoint and compels speech, it violates the First Amendment. Though Plaintiffs have also asserted, as an additional basis for enjoin-

ing Defendants from enforcing the Policy Requirement, that the provision is unconstitutionally vague,[48] the Court will not reach this argument at it has already determined that an injunction is warranted for the reasons already discussed.

4. *OSI Has Not Demonstrated a Likelihood of Success With Regard to Its Claim for Relief*

In seeking a declaratory judgment that the Policy Requirement cannot be applied to include OSI's activities, Plaintiffs express two related, but distinct, concerns. First, Plaintiffs have expressed a fear that USAID may attempt to impose the Policy Requirement directly upon OSI. This concern is easily dispensed with, as Defendants concede that OSI is not subject to

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[48] Plaintiffs claim that the policy requirement is impermissibly vague in three ways: it is unclear as to (1) the required content of a policy statement; (2) which privately funded activities will be construed as inconsistent with an opposition to prostitution; and (3) whether OSI's activities will be imputed to AOSI for purposes of ascertaining compliance.

The principal point of contention between the parties is the appropriate standard for assessing vagueness challenges in circumstances such as these. Plaintiffs argue that the relevant inquiry is whether the policy requirement fails to provide (1) a "person of ordinary intelligence a reasonable opportunity to know what is prohibited" and (2) "explicit standards for those who apply [it]." (Pl. Reply at 18 (*citing Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)).) Plaintiffs contend that this rigorous standard is applicable to cases in which a government benefit is conditioned upon a restriction on speech. Defendants disagree, maintaining that when Congress enacts pursuant to its Spending Clause power, the Constitution tolerates a greater degree of vagueness. In addition, Defendants suggest that, even if the Plaintiffs' heightened standard is used, Defendants have provided sufficient guidance in the form of AAPDs, grant provisions, and informal correspondence and meetings.

the Policy Requirement because it is not a recipient of funding under the Act, either as a grantee or sub-grantee. (*See* Def. Mem. at 26 & 44 n.29.) In no uncertain terms, Defendants state that "the Act plainly provides that only funding recipients are subject to the conditions of the" Policy Requirement. (*Id.* at 44 n.29.) Moreover, this concession is consistent with USAID's current interpretation of the Act. (*See* USAID, AAPD 05-04, issued June 9, 2005, attached to Rosberger Decl. as Exhibit C and to Diller Decl. as Exhibit 3 (limiting certification of compliance to grantees and sub-grantees).)

Second, Plaintiffs have alleged a concern that OSI's speech will be imputed to AOSI. Accordingly, OSI claims that, absent assurances, it must monitor its own speech for fear that AOSI will be penalized on the basis of OSI's expressive activities. In this regard, Plaintiffs suggest that Defendants' aforementioned concession takes care "to leave open the possibility that Defendants will penalize AOSI for OSI's actions." (Pl. Reply at 23.) Setting aside the sense that Plaintiffs read too much into Defendants' statement, the Court is convinced that rendering a declaratory judgment on this point would be premature, skating too close to Article III's prohibition on the issuance of advisory opinions.

The legal doctrines of standing and ripeness arise out of Article III and the requirement that federal courts adjudicate only actual cases or controversies. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) ("The basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudica-

tion, from entangling themselves in abstract disagreements over administrative policies[.]"); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 79 F.3d 1298, 1305 (2d Cir. 1996) ("A dispute is ripe for adjudication when there is a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.") (citations and internal quotation marks omitted). Central to the ripeness requirement is that courts should not endeavor to resolve contingencies that may or may not occur as expected or may not happen at all. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580-81, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985). Although the Court may agree that bringing affiliates within the ambit of the Policy Requirement would raise serious constitutional questions, Defendants simply have not taken any concrete steps in this direction. The prospect that Defendants will scrutinize OSI's speech and activities and impute them to AOSI is speculative and may very well never take place. To issue a declaratory judgment on this issue would be premature, and if OSI continues to monitor its own speech in this fashion, it does so out of an overabundance of caution, and its self-enforced silence cannot properly be said to be caused by Defendants' actions. Accordingly, because Plaintiffs have presented insufficient facts on this point to suggest that judicial intervention is required at this juncture, the Court declines to issue a declaratory judgment on this question.

B. *IRREPARABLE HARM*

Second Circuit precedent recognizes that, in light of our commitment to free speech, "the loss of First Amendment freedoms, for even minimal periods of time,

unquestionably constitutes irreparable injury." *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991) (*quoting Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)); *see also Green Party v. New York State Bd. of Elections*, 389 F.3d 411, 418 (2d Cir. 2004). Because the Policy Requirement, as interpreted by the Agencies, prohibits certain expressive activities and compels the Plaintiffs to speak in contravention of the First Amendment, Plaintiffs have satisfied this requirement for securing injunctive relief.

Plaintiffs have identified several specific examples of the irreparable harm they face by reason of their loss of First Amendment freedoms. In particular, Plaintiffs allege that AOSI is "chilled from fully planning and participating in a conference regarding sex work that it plans to co-sponsor in June of 2006." (Pl. Reply at 32; see also Suppl. Kushen Decl. ¶ 3 (stating that "AOSI continues to be severely constrained in the program activities we may undertake with our private funds . . . For example, AOSI plans to cosponsor a conference, slated for June 2006 . . . [at which] AOSI seeks to discuss further key policy issues . . . including the legal status of sex work . . . due to the pledge requirement, we are chilled from fully planning and participating in the conference").) Pathfinder has alleged that it cannot resume, with its private funding, its work with community organizations in Brazil that have sought legal reform of prostitution laws in that country in an effort to help prostitutes avoid exploitation and abuse. (Pellegrom Decl. ¶ 20.) One additional way in which Plaintiffs face irreparable harm by reason of the Policy Requirement is the potential effect that the requirement can have on Plaintiffs' private fund-raising activities. As is

discussed in Section IV.A.2.a.iii, certain of Plaintiffs privately donated grants are potentially at risk to the extent that those funds are subject to conditions placed by private sources conflicting with those imposed by the Policy Requirement. For example, AOSI and OSI have, "as their principles of governance, an adherence to the principles of an open society, including opposition to adopting any policy positions that would lead to the stigmatization of socially marginalized groups." (Compl. ¶ 36.) Plaintiffs allege that adopting a policy opposing prostitution violates this principle. (*Id.*) Given these circumstances, the Court finds that Plaintiffs have made the necessary showing of irreparable harm.

V. ORDER

For the reasons stated above, the Court concludes that absent a preliminary injunction, AOSI and Pathfinder will suffer irreparable harm from Defendants' enforcement of the Policy Requirement, which is likely to violate the First Amendment. Accordingly, it is hereby

ORDERED that the parties to submit to the Court, within fourteen days of the date of this Order, a proposed preliminary injunction conforming with the determinations in this Decision.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NO. 05 CIV. 8209

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., DEFENDANTS

Filed: Aug. 8, 2008

DECISION AND ORDER

VICTOR MARRERO, District Judge.

Plaintiffs, Alliance for Open Society International, Inc. ("AOSI"), and Pathfinder International ("Pathfinder") (collectively, "Plaintiffs") brought suit against defendants the United States Agency for International Development and Andrew S. Natsios in his official capacity as its administrator (collectively, "USAID"), the United States Department of Health and Human Services and Michael O. Leavitt in his official capacity as its Secretary (collectively, "HHS"), and the United States Centers for Disease Control and Prevention and Julie Louise Gerbeding in her official capacity as its Director (collectively "CDC") (together with USAID, HHS, and

CDC "Defendants," or the "Agencies," or the "Government"), alleging that a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. §§ 7601 *et seq.*, violated their First Amendment Rights. The Court granted Plaintiffs' motion for a preliminary injunction on May 9, 2006 enjoining Defendants from penalizing Plaintiffs. *See AOSI v. USAID*, 430 F. Supp. 2d 222 (S.D.N.Y. 2006) ("*AOSI I*").

Plaintiffs now move to add Global Health Council ("GHC") and InterAction (collectively, the "Associations") as plaintiffs to this action and to extend the preliminary injunction to the Associations.

I. *BACKGROUND*[1]

Additional background information pertinent to this action is discussed in *AOSI I*, familiarity with which is presumed.

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[1] The factual recitation below is drawn from Plaintiffs' Memorandum in Support of Motion of Plaintiffs for Leave to File a Second Amended Complaint and Motion by Global Health Council and InterAction for a Preliminary Injunction, dated Feb. 8, 2008 ("Pls.' Mem."); Government's Memorandum in Opposition to Plaintiffs' Motion to File a Second Amended Complaint and for a Preliminary Injunction, dated March 17, 2008 ("Defs.' Opp."); and Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Leave to File a Second Amended Complaint and Motion by Global Health Council and InterAction for a Preliminary Injunction, dated Apr. 7, 2008 ("Pls.' Reply"). Except as specifically quoted or otherwise cited, no further reference to these documents will be made.

A. *PROCEDURAL HISTORY*

In *AOSI I*, Plaintiffs challenged § 7631(f) of the Leadership Act, which provides:

> No funds made available to carry out this Act, or any amendment made to this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

22 U.S.C. § 7631(f) ("§ 7631(f)" or the "Policy Requirement"). The Court granted Plaintiffs' motion for a preliminary injunction, and held that the Policy Requirement, as interpreted by the Government, violated Plaintiffs' First Amendment rights by requiring the Government's private partners in the implementation of the Leadership Act to abstain from all speech, including privately-funded speech, that could be understood by the Government to be contrary to the Policy Requirement. *See AOSI I* at 268-70. The Court stated that a heightened standard of review was appropriate "when a spending enactment substantially impairs First Amendment protected activity conducted by private entities with private funds as a condition of receiving a government benefit," and held that the Policy Requirement was unconstitutional because it was not "narrowly tailored to fit Congress's intent." *Id.* at 267-68.

Following the granting of the Court's preliminary injunction in *AOSI I*, Defendants indicated that they would continue to enforce the Policy Requirement against similarly-situated grantees who were not parties

to this case. Plaintiffs attempted to add additional parties to this action to obtain protection from enforcement of the Policy Requirement, but the Government did not consent to extending the terms of the preliminary injunction and amending the complaint. The Government then appealed this Court's decision to the Second Circuit, and the case was placed on this Court's suspense docket pending the outcome of the appeal.

On July 23, 2007, while the Government's appeal was pending before the Second Circuit, both HHS and USAID issued "organizational integrity" guidance. *See* HHS Guidance, 72 Fed. Reg. 41,076 (July 23, 2007); USAID AAPD 05-04 Amend. 1 (July 23, 2007) (collectively, the "Guidelines"). On November 8, 2007, the Second Circuit issued a summary order remanding the case to this Court to determine whether the preliminary injunction should be granted in light of the issuance of the Guidelines. *See AOSI v. USAID*, 254 Fed. Appx. 843 (2d Cir. 2007). The Circuit Court did not offer an opinion on the merits of the claims or on the constitutionality of the guidelines or the statute, and stated that, on remand, this Court could "consider any legal arguments it deems relevant and take any additional evidence that may be appropriate." *Id.* at 846. The Second Circuit also ordered that the injunction remain in place pending the proceeding before this Court.

At a conference held on November 30, 2007, Plaintiffs informed the Court of their desire to amend the complaint to add the Associations as Plaintiffs, and to extend the preliminary injunction to the Associations. Defendants advised the Court that they would not consent to either motion, leading to the dispute now before the Court.

B. *THE GUIDELINES*

Under the Guidelines promulgated by the Agencies, the Government no longer interprets the Leadership Act to require a blanket ban on all restricted activities by recipients of Leadership Act funds, but rather, the Guidelines permit recipients to partner with affiliate organizations which may "express views on prostitution and sex trafficking contrary to the government's message," as long as there is "adequate separation" between the recipient and the affiliated organization such that the affiliations "do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking." Guidelines at 41,076. The Guidelines provide that:

> [C]ontractors, grantees and recipients of cooperative agreements ("Recipients") [under the Leadership Act] must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking ("restricted activities").

Id. The Guidelines state that a Recipient will be found to have objective integrity and independence from such an affiliated organization if:

(1) The affiliated organization is a legally separate entity;

(2) The affiliated organization receives no transfer of Leadership Act funds and Leadership Act funds do not subsidize restricted activities; and

(3) The Recipient is physically and financially separate from the affiliated organization. Mere

> bookkeeping separation of Leadership Act funds from other funds is not sufficient.

Id. The Guidelines elaborate that the agencies will "determine, on a case-by-case basis and based on the totality of the fact, whether sufficient physical and financial separation exists." *Id.* The Guidelines also set forth several non-exclusive factors to be used in that determination, but that the "presence or absence of any one or more factors will not be determinative." *Id.* The factors include:

> (i) The existence of separate personnel, management, and governance;
>
> (ii) The existence of separate accounts, accounting records, and timekeeping records;
>
> (iii) The degree of separation from facilities, equipment, and supplies used by the affiliated organization to conduct restricted activities, and the extent of such restricted activities by the affiliate;
>
> (iv) The extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present, and signs and materials that could be associated with the affiliated organization or restricted activities are absent; and
>
> (v) The extent to which [the agency], the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements.

Id. at 41,077.

C. *THE ASSOCIATIONS*

InterAction is the largest alliance of United States-based international development and humanitarian non-governmental organizations ("NGOs"). InterAction members collectively receive more than $1 billion from the United States Government annually, including Leadership Act funding from Defendants, and more than $7 billion from private sources. Plaintiffs represent that twenty members of InterAction, fourteen of which wish to remain anonymous, have informed InterAction that they are both subject to the Policy Requirement and desire relief from it.

GHC is a private, nonprofit membership alliance consisting of member organizations dedicated to international public health, including many United States-based grantees that receive HIV/AIDS funding from the Government. According to Plaintiffs, twenty-eight GHC members, eighteen of which wish to remain anonymous, have told GHC that they are both subject to the Policy Requirement and desire relief from it.

II. *DISCUSSION*

Plaintiffs move to amend the complaint to add the Associations and to extend the preliminary injunction to the Associations. Plaintiffs contend that they can prove a likelihood of success on the merits because the Guidelines (1) unconstitutionally compel speech; (2) impose unconstitutional conditions on Plaintiffs' First Amendment rights; and (3) are unconstitutionally vague. Defendants argue that Plaintiffs' motion to amend the complaint should be denied, as the Associations lack standing, and therefore, such an amendment would be futile.

Additionally, Defendants argue that Guidelines as promulgated are constitutional under the standards enunciated by the Supreme Court and the Second Circuit. The Court will first address Defendants' standing argument, and will then address the likelihood of success for Plaintiffs' arguments regarding the constitutionality of the Guidelines.

A. *STANDING*

As a threshold matter, the Court must first determine whether the Associations have standing to bring this action, as amending the complaint would otherwise be futile. An amendment is futile if the court lacks jurisdiction over the amended pleading, or if it would otherwise be subject to a successful motion to dismiss. *See, e.g., S.S. Silberblatt, Inc. v. East Harlem Pilot Block,* 608 F.2d 28, 42 (2d Cir. 1979); *Freeman v. Marine Midland Bank—New York,* 494 F.2d 1334, 1338 (2d Cir. 1974); *Mitchell v. Keane,* 974 F. Supp. 332, 343-44 (S.D.N.Y. 1997).

"The doctrine of standing, which addresses the question of whether the plaintiff is entitled to have the courts decide the merits of the dispute or of particular issues, embraces both 'constitutional' and 'prudential' requirements." *Center for Reprod. Law and Policy v. Bush,* 304 F.3d 183, 195-96 (2d Cir. 2002) (*quoting Sullivan v. Syracuse Hous. Auth.,* 962 F.2d 1101, 1106 (2d Cir. 1992)). The "irreducible constitutional minimum" of standing contains three elements: (1) the plaintiff must have suffered an "injury-in-fact," meaning an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent, and not conjectural or hypothetical; (2) there must be a "causal connection" between the injury and the challenged conduct;

and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

An association attempting to bring suit on behalf of its members must satisfy the three-part test for associational standing by establishing that:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The plaintiff has the burden of establishing the elements of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 112 S. Ct. 2130.

1. *Standing of Individual Members*

To satisfy the first prong of the *Hunt* test, at least one member of the association must satisfy the constitutional requirements of injury-in-fact, causation, and redressability. *See Building & Constr. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) ("An association bringing suit on behalf of its members must allege that one or more of its members has suffered a concrete and particularized injury. . . ."). Defendants argue that the injuries alleged by the Associations are merely hypothetical, and thus insufficient for standing, because none of the

Associations' members has attempted to form an affiliate to comply with the Guidelines.

The Associations allege that they have multiple members who meet the individual standing requirements, because: (1) they have adopted policies they otherwise would not have adopted, and (2) they do not know what speech is compelled, and what speech and activities are prohibited by the Policy Requirement and Guidelines. Both GHC and InterAction have conducted surveys of their members to determine the extent of the effect of the Policy Requirement on their membership. GHC states that it has 28 United States-based members which aver that they are subject to the Policy Requirement and would like relief from it; InterAction has 20 such members. For example, Cooperative for Assistance and Relief Everywhere, Inc. ("CARE"), which is a member of both GHC and InterAction, has purportedly adopted a policy opposing prostitution solely because of the Policy Requirement, and thus alleges that it is compelled to speak the Government's message and is prevented from communicating lessons from its HIV prevention work with prostitutes in India and Bangladesh because of the Policy Requirement. Furthermore, Pathfinder is also a member of GHC and InterAction, and its standing in the case has never been disputed. But for the preliminary injunction, Pathfinder alleges that it would have to refrain from sharing lessons from its privately-funded HIV prevention work with prostitutes. IntraHealth, a member of GHC, has stated that it wishes to remain silent on the social and political aspects of sex work, and therefore does not wish to speak to Government's viewpoint.

The Court is persuaded that the Associations have pled a sufficient injury-in-fact of at least one of their individual members. Bearing in mind that at the pleading stage mere allegations are sufficient to carry the plaintiff's burden of establishing the elements of standing, the Associations have adequately alleged both actual and imminent injuries. *See Lujan*, 504 U.S. at 561, 112 S. Ct. 2130. The Associations members are given the option of either foregoing Leadership Act funds, or attempting to comply with the legal separation requirement, which they contend is unconstitutional and would impose an extremely high financial cost for its members. *See American Booksellers Found. v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (finding standing where plaintiffs were presented with the choice of risking prosecution or of censoring the content of their websites). Additionally, Plaintiffs have met the threshold for establishing standing for a First Amendment claim by demonstrating "'an actual and well-founded fear that the law will be enforced against [them].'" *Id.* (*quoting Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000)). Furthermore, the fact that the Associations' members are required to speak the Government's message in exchange for the Leadership Act subsidy is a sufficient injury-in-fact for their compelled speech claim. Plaintiffs should not be forced to either forego their constitutional rights or risk legal action and the loss of their subsidies in order to have standing to challenge the Guidelines and the Policy Requirement.

Accordingly, the Court finds that the Associations have sufficiently demonstrated that at least one of their members would have individual standing to bring this case.

2. *Germaneness*

The second prong of the *Hunt* test of associational standing requires the plaintiff to establish that "the interests it seeks to protect are germane to the organization's purpose." 432 U.S. at 343, 97 S. Ct. 2434. "[T]he requirement of germaneness is undemanding; mere pertinence between litigation subject and organizational purpose is sufficient." *Building & Constr. Trades Council of Buffalo,* 448 F.3d at 148 (internal quotation marks omitted).

The Associations state that the purpose of their respective organizations is "to promote open debate on issues of public policy and to share among their members best practices in public health and humanitarian work." (Pl. Mem., at 17.) Defendants do not dispute that the purposes of the Associations are germane to the interests at stake in this litigation.

Accordingly, the Court finds that Plaintiffs have sufficiently alleged the germaneness requirement.

3. *Participation of Individual Members*

Under the third prong of the *Hunt* test, plaintiffs seeking associational standing must establish that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343, 97 S. Ct. 2434. This third prong is a prudential requirement left to the discretion of the court, not a constitutional requirement. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 555, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996). With regard to individual participation in the relief requested:

> whether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Warth v. Seldin, 422 U.S. 490, 515, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

However, associational standing is not automatically granted whenever an association requests equitable relief, rather than damages. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (noting that an "organization lacks standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof, or where the relief requested would require the participation of individual members in the lawsuit") (internal quotations and citations omitted).

Here, the Associations assert that there is no requirement for individualized proof for their claims that the Policy Requirement and its Guidelines are compelled speech, unconstitutionally vague, and do not provide an adequate alternative channel for their protected speech in light of the burdens on their members. They argue that no individualized determination is necessary because the Policy Requirement and Guidelines apply to all members and impose burdens common to them. For

example, all United States-based Leadership Act grantees must comply with the Policy Requirement, and the burdens of creating a legally and physically separate affiliate organization, registering the new legal entity with a foreign government, obtaining visas for staff and permission to open separate bank accounts, financing the affiliate, and staffing it with new personnel, equipment and supplies, would fall upon all members of the Association attempting to comply with the Guidelines.

The Associations assert that the applicable line of cases are those in which the determination of the claims depend on the Government's application of the law, and not on the facts concerning any individual grantee. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, the Supreme Court upheld the associational standing of an association of law schools to assert a claim that a military recruiting condition on federal funds violated the First Amendment rights of its members. *See* 547 U.S. 47, 52 n. 2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). The district court found there was no need for individualized proof because the association's claim was "not that there is something unconstitutional about the manner in which the Government is applying the [statute and regulations] to a particular institution," but rather that the claim "is that the Government is applying a statute and its implementing regulations to almost every law school in the nation in a way that violates the law schools' First Amendment rights." *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 291 (D.N.J. 2003), *rev'd on other grounds*, 390 F.3d 219 (3d Cir. 2004), *rev'd on other grounds*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). The Associations also point to *National Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press*, where

this prong of the *Hunt* test was satisfied when half of the elements of the claims "can be proven largely by reference to the defendants' [conduct]. . . ." 990 F. Supp. 245, 249-50 (S.D.N.Y. 1997). The *College Bookstores* Court also found that while "[s]ome individuated proof may be required" it was "not nearly enough to require each [the association's members] to bring suit separately" and "[t]he fact that a limited amount of individuated proof may be necessary does not in itself preclude associational standing." *Id.* (*citing New York State Nat'l Org. of Women v. Terry*, 886 F.2d 1339, 1349 (2d Cir. 1989) (granting associational standing even though evidence from some individual members was required)).

Plaintiffs argue that as their compelled speech and unconstitutional conditions claims will be proven largely by reference to Defendants' actions, and that some individualized showing of the facts common to all members to support their claims is not fatal to associational standing. Further, they assert that no individualized proof is required to demonstrate that the Policy Requirement and Guidelines are unconstitutionally vague.

Defendants reply that the claims of the Associations cannot be adjudicated without the participation of individual members, *i.e.* that the "fact and extent" of the alleged injuries-in-fact of the individual members requires "individualized proof." *Warth*, 422 U.S. at 515-16, 95 S. Ct. 2197. They argue that an assessment of whether the Guidelines unduly burden the Associations' members' First Amendment rights or whether the Guidelines provide an adequate alternative channel for protected speech under the relevant case law, will depend upon an assessment of the impact of the Guidelines

on each individual member. The Defendants further contend that the Court cannot determine the degree to which a funding recipient is burdened without organization-specific evidence of what countries that organization operates in, whether the organization seeks to use private funding in that country to communicate in a manner inconsistent with an anti-prostitution policy, and the actual legal and practical requirements of operating an affiliate in that country.

Defendants, in turn, rely on those cases where associational standing has been denied because either the claims asserted or relief requested required individualized proof. *See, e.g., Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993) (finding that an association of landlords did not have standing to challenge city rent regulations on takings grounds, because establishing the takings claim would require a "factual inquiry for each landlord who alleges that he has suffered a taking [in order] to determine the landlord's particular return based on a host of individualized financial data"); *Bano*, 361 F.3d at 714-15 (finding that organizations representing individual landowners did not have standing to pursue claims for damages on behalf of their members for bodily harm and damage to real property resulting from groundwater contamination, which necessarily would require individualized proof); *Warth*, 422 U.S. at 515-16, 95 S. Ct. 2197 (holding that an organization of construction firms could not seek damages for the profits and business lost by its members because "whatever injury might have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof"). Thus, Defendants argue that because a central issue on remand is whether the burdens imposed by the Guide-

lines are unconstitutional, the claims asserted by the Associations require individualized proof as to each member's burdens, and so associational standing should be denied.

The Court finds that neither the claims asserted nor the relief requested by the Associations would require any significant participation of individual members in the lawsuit. As the Associations request injunctive and declaratory relief, the "relief requested" aspect of the third prong of the *Hunt* test is satisfied. *See Warth*, 422 U.S. at 515, 95 S. Ct. 2197. While Defendants' arguments are not without some merit, ultimately they do not speak to the vagueness claims or compelled speech claims asserted by the Associations.

The compelled speech and vagueness claims do not require individualized proof, as it is the conduct of Defendants in the form of the Policy Requirement and the Guidelines that will be the primary subject of inquiry. The Policy Requirement and the Guidelines apply to all Leadership Act grantees which are members of the Associations. While some individualized showing of facts common to all members to support the factual development of the Associations' compelled speech and vagueness claims will be necessary, this test does not preclude granting associational standing. *See College Bookstores*, 990 F. Supp. at 249-50; *New York State Nat'l Org. of Women*, 886 F.2d at 1349. To enjoin an unconstitutional practice, the Associations do not have to show redundant evidence of each separate impact of the Policy Requirement and Guidelines on every one of their members. *See Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 291; *cf. American Booksellers Ass'n, Inc. v. Houghton Mifflin Co., Inc.*, No. 94 Civ. 8566, 1995 WL

92270, at *5 (S.D.N.Y. Mar. 3, 1995) (holding that it was not necessary for the association to show impact on each and every member because "[a]t some point, the proof [provided by individual members] will become redundant").

As for the Associations' claims that the Policy Requirement and its Guidelines do not provide an adequate alternative channel for their protected speech in light of the alleged burdens on their members, these claims will undoubtedly require a more thorough factual development to establish the extent of the burden on the Associations' members. However, given the enumeration in the Guidelines of the factors to be considered in determining whether legal and physical separation of the parent organization and its affiliate exists, all the Associations' members will share the common burden of complying with the Guidelines. Thus, requiring an individualized showing of the efforts of every member of the Associations to comply with the Guidelines will necessarily involve duplicative and redundant proof. While the Court does not doubt that the precise actions and expenditures taken to comply with the Guidelines will vary from organization to organization, at issue in this case is whether the baseline burden enumerated in the Guidelines imposes unconstitutional conditions upon the protected speech of Plaintiffs. Given that the third prong of the *Hunt* test is a prudential consideration, that individualized evidence would be duplicative and redundant counsels in favor of granting associational standing in the interests of judicial economy. *See Hunt*, 432 U.S. at 343-44, 97 S. Ct. 2434 (granting such standing where the evidence included an individualized showing of the varying injuries by association members); *see also College Bookstores*, 990 F. Supp. at 249-50. In eval-

uating a challenge by an association of Washington apple growers to a North Carolina statute which required apple containers sold in North Carolina to be either unmarked or contain only the applicable U.S.D.A. grades on the outside, the *Hunt* Court held that:

> The prerequisites to "associational standing" described in *Warth* are clearly present here. The Commission's complaint alleged, and the District Court found as a fact, that the North Carolina statute had caused some Washington apple growers and dealers (a) to obliterate Washington State grades from the large volume of closed containers destined for the North Carolina market at a cost ranging from 5 to 15 cents per carton; (b) to abandon the use of preprinted containers, thus diminishing the efficiency of their marketing operations; *or* (c) to lose accounts in North Carolina. . . . [N]either the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context.

Hunt, 432 U.S. at 343-44, 97 S. Ct. 2434 (emphasis added). Thus, the varying extent of the burdens incurred by individual members of the Commission to comply with the North Carolina statute at issue did not preclude the granting of associational standing. *Id.* Authorities cited by Defendants do not suggest a different result, because takings claims, medical injuries, and damages to real property are prototypical examples of claims requiring individualized proof that do not speak to the vagueness claims or compelled speech claims of the Associations. *Cf. Forum for Academic & Institutional Rights*, 547 U.S. at 52 n. 2, 126 S. Ct. 1297 (recognizing associational standing in the context of a compelled speech claim).

Moreover, in cases involving a facial challenge to a statute on First Amendment grounds, the prudential limitations of associational standing are generally relaxed because of the important societal interests that are implicated. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."); *Lerman v. Board of Elections in the City of New York*, 232 F.3d 135, 143-45 (2d Cir. 2000) (discussing that a facial challenge to a statute on First Amendment grounds is governed by the overbreadth doctrine where prudential standing concerns are relaxed); *New York City C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461, 468-69 (S.D.N.Y. 2004) (relaxing the prudential standing requirements in the context of an organization's challenge to the New York City smoking ban on First Amendment grounds).

The preceding discussion demonstrates that the Associations have established that at least one member which satisfies the constitutional requirements of injury-in-fact, causation, and redressability, that the Associations' purposes are germane to the interests at stake in this dispute, that the claims asserted and the relief requested do not require the participation of individual members in the lawsuit beyond a limited showing of facts common to their members, and that the interests in judicial economy and protecting the right to free ex-

pression balance against the restriction of associational standing.

Accordingly, the Court finds that the Associations have sufficiently demonstrated that they have associational standing to bring this action.

B. *PRELIMINARY INJUNCTION*

For the Court to issue a preliminary injunction against the Government, Plaintiffs must demonstrate both a likelihood of success on the merits and a threat of irreparable harm. *See, e.g., Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 763 (2d Cir. 1999) ("*Velazquez I*").

1. *Compelled Speech*

In *AOSI I*, the Court held that the Policy Requirement impermissibly compelled speech. *See* 430 F. Supp. 2d at 274-76. The Court was not persuaded by Defendants' argument that the Policy Requirement did not compel speech because Plaintiffs were subject to the restrictions on their First Amendment rights only if they chose to accept Leadership Act funds. *Id.* at 274. The Court found that such a "take-it-or-leave-it answer to an infringement of speech . . . is simply not in keeping with the expectations our society derives from First Amendment freedoms. . . ." *Id.* The Court also disagreed with Defendants' view that Supreme Court doctrine on compelled speech was not applicable because those cases did not address Spending Clause enactments, and held:

> That the Policy Requirement at issue here arises out of a Spending Clause enactment, and thus is not a direct regulation of speech, is not enough to distinguish it from the overriding principle that emerges from [the Supreme Court line of] cases: that the gov-

> ernment cannot compel speech in exchange for participation in a government program, even a program to which there is no direct entitlement.

Id. at 275.

Plaintiffs argue that the Guidelines do not remedy this constitutional defect, and thus also unconstitutionally compel speech. The Court agrees. While the Guidelines may or may not provide an adequate alternate channel for Plaintiffs to express their views regarding prostitution, the clause requiring Plaintiffs to adopt the Government's view regarding the legalization of prostitution remains intact. Plaintiffs are still not permitted to abstain from taking a view with regard to prostitution, but rather, are required to espouse the Government's position. Because the Guidelines do not alter the compelled speech provision of the Policy Requirement, the Court finds, for the same reasons as stated in *AOSI I*, that the provision unconstitutionally compels speech. Therefore, Plaintiffs have demonstrated a likelihood of success to warrant the extension of the preliminary injunction ordered in *AOSI I*.

2. *Unconstitutional Conditions*

i. *Standard of Review*

In *AOSI I*, this Court used heightened scrutiny to hold that when the Government seeks to implement a viewpoint-based restriction that imposes burdens on the privately funded speech of grantees, it must show that the restriction is "narrowly tailored to fit Congress's intent." 430 F. Supp. 2d at 267. Defendants argue that under the Second Circuit's holding in *Brooklyn Legal Servs.*, 462 F.3d 219 (2d Cir. 2006) ("BLS"), the Court's use of heightened scrutiny was improper.

In *BLS*, the Second Circuit upheld the constitutionality of federal restrictions on local legal assistance programs that receive funding through the Legal Services Corporation ("LSC"). The restrictions applied regardless of whether the recipients received non-federal funds in addition to LSC funds, and prohibited recipients from, among other things, participating in class action suits, seeking attorneys' fees, and personally soliciting clients. Under the LSC regulations, recipients could engage in restricted activities through affiliate organizations provided the recipient maintained "objective integrity and independence" from the affiliate. *Id.* at 223. The Second Circuit held that "Congress may burden the First Amendment rights of recipients of government benefits *if the recipients are left with adequate alternative channels for protected expression.*" *Id.* at 231 (emphasis in original). The Second Circuit rejected the use of heightened scrutiny in stating that the interests of LSC and the federal government "cannot be subject to the least- or less-restrictive-means mode of analysis" as that was "more appropriate for assessing the government's direct regulation of a fundamental right" and not "when the government creates a federal spending program." *Id.* at 229 (*citing United States v. American Library Ass'n*, 539 U.S. 194, 211-12, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) and *South Dakota v. Dole*, 483 U.S. 203, 207, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987)). The *BLS* Court stated that the district court had "fashioned an 'undue burden' test out of whole cloth from unrelated case law concerning abortion, commerce, and ballot access rights." *Id.*, at 232. Accordingly, Defendants argue that the use of heightened scrutiny in *AOSI I* was improper, and the appropriate standard is whether the

recipients are left with adequate alternative channels for protected expression under the Guidelines.

The Court disagrees with Defendants that *BLS* provides the appropriate standard by which to review Plaintiffs' unconstitutional conditions claim. The holding in *BLS* was premised on a finding that the statute at issue did not discriminate on the basis of viewpoint, and the Second Circuit indicated that the result would have been different had the statute done so. *See BLS*, 462 F.3d at 230 (stating that restrictions "directed toward speech" are on the "'highest rung' of First Amendment values" which may require "closer attention" (*quoting Velazquez v. LSC*, 164 F.3d 757, 771 (2d Cir. 1999) ("*Velazquez I*"), *aff'd on other grounds*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001)) (stating that the Supreme Court would not tolerate a regulation authorizing grants funding support for, but barring criticism of, a government policy)).

Furthermore, in *Velazquez I*, the Second Circuit invalidated a viewpoint-based restriction that prohibited recipients from using both federal and private funds to challenge welfare laws without referencing the "adequate alternative channels" analysis it used for those provisions it deemed viewpoint neutral. *See Velazquez I*, 164 F.3d at 770 (stating that "[w]hether a subsidy that is dependent on viewpoint constitutes illegal discrimination presents a complex question, which is illuminated by three recent Supreme Court holdings"). The Second Circuit held that the because the provision was viewpoint discriminatory, it was "subject to strict First Amendment scrutiny." *Id.* at 772. However, *Velazquez I* did not articulate the standard in any additional detail, as it simply noted that the defendants "offered no argu-

ments as to why the provision can survive such scrutiny and [the Second Circuit] perceive[d] none." *Id.*

In *AOSI I*, the Court found that the there was no settled articulation of the applicable heightened standard, and adopted the Supreme Court's articulation in *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991), which applied a traditional First Amendment narrow tailoring test to the challenged provision. "In applying this heightened scrutiny, the Court asks whether the restriction, as interpreted and applied by the Defendants is 'narrowly tailored to fit Congress's intent.'" *AOSI I*, 430 F. Supp. 2d at 267 (*quoting Rust*, 500 U.S. at 195 n.4, 111 S. Ct. 1759).

Accordingly, because the Court finds that the Second Circuit's decision in *BLS* did not change the applicable standard of review for Plaintiffs' unconstitutional conditions claim, the Court's reasoning and determination of the appropriate standard of review in *AOSI I* is still applicable in determining whether the preliminary injunction should be extended to the Associations, and the Court will apply such heightened scrutiny using the narrow tailoring test.

ii. *Application*

In *AOSI I*, the Court held that while the Government had a legitimate interest in not having its message "garbled" and in ensuring the uniformity of its message, such an interest was undercut by the exemption of certain high-profile organizations, which were permitted to engage in dissenting speech, and as such, the Government's interests were not sufficient to warrant a blanket ban on Plaintiffs' privately-funded speech. 430 F. Supp. 2d at 269. The issue now before the Court is whether

the Guidelines sufficiently cure this constitutional defect.

Plaintiffs argue that the Guidelines are unconstitutional for the same reasons as the Policy Requirement was found unconstitutional in *AOSI I*, specifically because: (1) the Policy Requirement still excludes certain funding recipients, and thus, the Government's interests remain undermined; (2) the Policy Requirement still imposes a blanket ban on speech by funding recipients because the Guidelines do not allow recipients to advance their privately-funded speech through an affiliate organization that they control through overlapping boards and management; and (3) the Policy Requirement continues to massively burden Plaintiffs' privately funded speech because of the Guidelines' extreme separation requirement without adequate justification. Plaintiffs further argue that the affiliate regimes that were upheld by the Supreme Court in two relevant cases did not mandate such extreme separation, but rather, allowed shared personnel, management, governance, and/or boards. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544-46, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983); *Rust*, 500 U.S. at 180-81, 111 S. Ct. 1759. Finally, Plaintiffs argue that the Guidelines can be differentiated from the LSC regulations, which "allow control at the Board level, [so] recipients will have an avenue through which to engage in restricted activities." 62 Fed. Reg. 27,695, 27,697 (May 21, 1997).

Defendants respond that the Guidelines were modeled on the LSC restrictions, and thus, the case is squarely on point with *BLS* and *Velazquez I* (collectively, the "LSC Cases"), which upheld restrictions on

local legal assistance programs. Defendants also rely on the recent opinion of the D.C. Circuit upholding the Policy Requirement, while also acknowledging that such a holding is only persuasive authority. *See DKT Int'l, Inc. v. USAID*, 477 F.3d 758 (D.C. Cir. 2007).

The Court finds that there are significant differences between the instant case and the LSC Cases. First, as previously stated, this case is governed by heightened scrutiny, whereas the LSC cases were not, and thus were not subject to a narrow-tailoring analysis. Second, the Associations operate internationally in dozens of countries, many of them developing states still lacking administrative rules under which foreign entities may function effectively, which increases the burdens imposed by even identical regulations. Third, the LSC regulations allow for control at the board level, whereas the Guidelines contain no such provision. Additionally, while the D.C. Circuit upheld the Policy Requirement in *DKT*, it did so based on the Government's representations that recipients would be able to express their privately-funded views through a subsidiary that was not subject to the Policy Requirement. *See* 477 F.3d at 763 (stating that "nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies that it has a policy opposing prostitution"). The Guidelines had not yet been promulgated at the time of the *DKT* decision, and therefore, the D.C. Circuit was not aware of the restrictions placed on recipients, such that compliance with the Guidelines is not as straightforward as the simple organization of a subsidiary, which normally does not entail the separations imposed by the Guidelines.

In *AOSI I*, the Court concluded that "*Rust* speaks most directly to the issues of the instant case, largely because both cases involve speech regulated through Spending Clause enactments through which the government conveys a message and endeavors to compel compliance with that message by placing conditions on eligibility for government benefits." *AOSI I*, 430 F. Supp. 2d at 267-68. The *Rust* plaintiffs challenged the "program integrity" requirement of Title X of the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-6 ("Title X"), which provides federal funding for family planning services. The program integrity requirement mandates that Title X projects not provide counseling services concerning the use of abortion, prohibits Title X projects from engaging in activities that encourage, promote, or advocate abortion, and requires that Title X projects be physically and financially separate from prohibited abortion activities. *See Rust*, 500 U.S. at 179-80, 111 S. Ct. 1759. The *Rust* Court noted that the separation requirement "distinguishes between a Title X *grantee* and a Title X *project*," and that a grantee may continue to engage in abortion-related activities through programs that are separate and independent from projects that receive Title X funds. *Id.* at 196, 111 S. Ct. 1759 (emphasis in original). "To be deemed physically and financially separate, 'a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient.'" *Id.* at 180-81, 111 S. Ct. 1759 (*quoting* 42 C.F.R. § 59.9 (1989)). The regulations at issue in *Rust* enumerated various factors considered by the Government to determine the existence of adequate separation, including: (1) separate accounting records and separate personnel; (2) the degree of separation

from facilities (specifically, treatment, consultation, examination and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities; and (3) the extent to which signs and other forms of identification of the Title X project are present, and signs and material promoting abortion are absent. *See* 42 C.F.R. § 59.9 (1989).

Because the Court has previously noted the similarities between the instant case and *Rust*, the Court will now also look to *Rust* in evaluating whether the Guidelines are narrowly tailored to effectuate Congress's intent. In *Rust*, the Government defended the separation requirements on the grounds that they were "necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." *Id.* at 188, 111 S. Ct. 1759. In this case, the Government's interest is exactly the same as that articulated in *Rust*, and yet, the burdens imposed on the First Amendment rights of recipients are significantly greater than those imposed by the regulation at issue in *Rust*. Notably absent from the regulations at issue in *Rust* is the separate management and governance requirement, which is prescribed in the Guidelines.

Given the symmetry of governmental interests in *Rust* and the instant case, the existence of a less-burdensome affiliate scheme in *Rust* supports the argument that the Guidelines are not sufficiently narrowly tailored, because a less-restrictive means is available to adequately protect the Government's interests. Additionally, the Court agrees with Plaintiffs that the Guidelines' separate management and governance require-

ment mandates that any Leadership Act recipient that wishes to express views contrary to the Government's mandated opposition to prostitution would be able to do so only through an affiliate over which it exercised no control. Finally, because a substantial number of significant organizations remain exempt from the Policy Requirement and Guidelines, the Government's interests in conveying a uniform message remain undermined, as noted in *AOSI I*. *See* 430 F. Supp. 2d at 269.

The Court finds that the Guidelines require more separation than is reasonably necessary to satisfy the Government's legitimate interest, embodied in the Policy Requirement, and that the Guidelines are not narrowly tailored to achieve Congress's goals. Because the Court finds that the Policy Requirement and the Guidelines would not survive heightened scrutiny, and also impermissibly compel speech, they violate the First Amendment. Accordingly, the Associations have demonstrated a likelihood of success on the merits.

3. *Vagueness*

The Court did not address Plaintiffs' vagueness claims in *AOSI I*, because it granted the preliminary injunction on the basis of their claims concerning compelled speech and unconstitutional conditions. The Court likewise does the same here, and will not reach this argument since it has already determined that an injunction is warranted for the reasons already discussed.

C. *RES JUDICATA*

Defendants argue that DKT International ("DKT"), as a member of GHC, is barred from seeking relief in this action because its application is prohibited by the

principles of res judicata.[2] Plaintiffs concede that the D.C. Circuit's ruling in *DKT*, 477 F.3d 758, on viewpoint discrimination and compelled speech bars DKT from seeking the protection of this preliminary injunction under the principle of res judicata. However, Plaintiffs argue that their vagueness and unconstitutional conditions challenges to the Policy Requirement, as modified by the Guidelines, were not before the *DKT* Court, and therefore, that if the Court issues a preliminary injunction based on those challenges, res judicata should not bar DKT from the protections of the preliminary injunction.

The Court finds that DKT is barred from benefitting from the preliminary injunction, as the Court's decision to extend the preliminary injunction is based on a finding that the Policy Requirement does discriminate on the basis of viewpoint and does compel speech.

III. *ORDER*

For the reasons stated above, it is hereby

ORDERED that the motion (Docket No. 66) of Plaintiffs Alliance for Open Society International ("AOSI") and Pathfinder International ("Pathfinder") for leave to file a Second Amended Complaint to add Global Health

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[2] Defendants also argue in their papers that GHC itself was barred by virtue of the participation of DKT as its privy. By letter dated, June 20, 2008, Defendants acknowledged that the Supreme Court disapproved the doctrine of "virtual representation" in its recent decision in *Taylor v. Sturgell*, — U.S. —, 128 S. Ct. 2161, 2167, 171 L. Ed. 2d 155 (2008). Therefore, Defendants concede that they could no longer demonstrate that non-party preclusion principles bar GHC from participating in this action. Accordingly, the Court will not address Defendants' res judicata argument with regard to GHC.

Council ("GHC") and InterAction as plaintiffs to this action is GRANTED; and it is further

ORDERED that the motion of GHC and InterAction for a preliminary injunction barring defendants the United States Agency for International Development and Andrew S. Natsios in his official capacity as its administrator, the United States Department of Health and Human Services and Michael O. Leavitt in his official capacity as its Secretary, and the United States Centers for Disease Control and Prevention and Julie Louise Gerbeding in her official capacity as its Director from enforcing the requirement § 7361(f) of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. §§ 7601 *et seq.*, is GRANTED, but that DKT International, as a member of GHC, shall be barred from benefitting from the preliminary injunction.

SO ORDERED.

APPENDIX E

1. 22 U.S.C. 7601 (2006 & Supp. IV 2010) provides:

Findings

Congress makes the following findings:

(1) During the last 20 years, HIV/AIDS has assumed pandemic proportions, spreading from the most severely affected regions, sub-Saharan Africa and the Caribbean, to all corners of the world, and leaving an unprecedented path of death and devastation.

(2) According to the Joint United Nations Programme on HIV/AIDS (UNAIDS), more than 65,000,000 individuals worldwide have been infected with HIV since the epidemic began, more than 25,000,000 of these individuals have lost their lives to the disease, and more than 14,000,000 children have been orphaned by the disease. HIV/AIDS is the fourth-highest cause of death in the world.

(3)(A) At the end of 2002, an estimated 42,000,000 individuals were infected with HIV or living with AIDS, of which more than 75 percent live in Africa or the Caribbean. Of these individuals, more than 3,200,000 were children under the age of 15 and more than 19,200,000 were women.

(B) Women are four times more vulnerable to infection than are men and are becoming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS.

(C) Women and children who are refugees or are internally displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection.

(4) As the leading cause of death in sub-Saharan Africa, AIDS has killed more than 19,400,000 individuals (more than 3 times the number of AIDS deaths in the rest of the world) and will claim the lives of one-quarter of the population, mostly adults, in the next decade.

(5) An estimated 2,000,000 individuals in Latin America and the Caribbean and another 7,100,000 individuals in Asia and the Pacific region are infected with HIV or living with AIDS. Infection rates are rising alarmingly in Eastern Europe (especially in the Russian Federation), Central Asia, and China.

(6) HIV/AIDS threatens personal security by affecting the health, lifespan, and productive capacity of the individual and the social cohesion and economic well-being of the family.

(7) HIV/AIDS undermines the economic security of a country and individual businesses in that country by weakening the productivity and longevity of the labor force across a broad array of economic sectors and by reducing the potential for economic growth over the long term.

(8) HIV/AIDS destabilizes communities by striking at the most mobile and educated members of society, many of whom are responsible for security at the local level and governance at the national and subnational levels as well as many teachers, health care personnel, and other community workers vital to community development and the effort to combat HIV/AIDS. In some

countries the overwhelming challenges of the HIV/AIDS epidemic are accelerating the outward migration of critically important health care professionals.

(9) HIV/AIDS weakens the defenses of countries severely affected by the HIV/AIDS crisis through high infection rates among members of their military forces and voluntary peacekeeping personnel. According to UNAIDS, in sub-Saharan Africa, many military forces have infection rates as much as five times that of the civilian population.

(10) HIV/AIDS poses a serious security issue for the international community by—

(A) increasing the potential for political instability and economic devastation, particularly in those countries and regions most severely affected by the disease;

(B) decreasing the capacity to resolve conflicts through the introduction of peacekeeping forces because the environments into which these forces are introduced pose a high risk for the spread of HIV/AIDS; and

(C) increasing the vulnerability of local populations to HIV/AIDS in conflict zones from peacekeeping troops with HIV infection rates significantly higher than civilian populations.

(11) The devastation wrought by the HIV/AIDS pandemic is compounded by the prevalence of tuberculosis and malaria, particularly in developing countries where the poorest and most vulnerable members of society, including women, children, and those individuals living with HIV/AIDS, become infected. According to the World Health Organization (WHO), HIV/AIDS, tu-

berculosis, and malaria accounted for more than 5,700,000 deaths in 2001 and caused debilitating illnesses in millions more.

(12) Together, HIV/AIDS, tuberculosis, malaria and related diseases are undermining agricultural production throughout Africa. According to the United Nations Food and Agricultural Organization, 7,000,000 agricultural workers throughout 25 African countries have died from AIDS since 1985. Countries with poorly developed agricultural systems, which already face chronic food shortages, are the hardest hit, particularly in sub-Saharan Africa, where high HIV prevalence rates are compounding the risk of starvation for an estimated 14,400,000 people.

(13) Tuberculosis is the cause of death for one out of every three people with AIDS worldwide and is a highly communicable disease. HIV infection is the leading threat to tuberculosis control. Because HIV infection so severely weakens the immune system, individuals with HIV and latent tuberculosis infection have a 100 times greater risk of developing active tuberculosis diseases thereby increasing the risk of spreading tuberculosis to others. Tuberculosis, in turn, accelerates the onset of AIDS in individuals infected with HIV.

(14) Malaria, the most deadly of all tropical parasitic diseases, has been undergoing a dramatic resurgence in recent years due to increasing resistance of the malaria parasite to inexpensive and effective drugs. At the same time, increasing resistance of mosquitoes to standard insecticides makes control of transmission difficult to achieve. The World Health Organization estimates that between 300,000,000 and 500,000,000 new cases of malaria occur each year, and annual deaths

from the disease number between 2,000,000 and 3,000,000. Persons infected with HIV are particularly vulnerable to the malaria parasite. The spread of HIV infection contributes to the difficulties of controlling resurgence of the drug resistant malaria parasite.

(15) HIV/AIDS is first and foremost a health problem. Successful strategies to stem the spread of the HIV/AIDS pandemic will require clinical medical interventions, the strengthening of health care delivery systems and infrastructure, and determined national leadership and increased budgetary allocations for the health sector in countries affected by the epidemic as well as measures to address the social and behavioral causes of the problem and its impact on families, communities, and societal sectors.

(16) Basic interventions to prevent new HIV infections and to bring care and treatment to people living with AIDS, such as voluntary counseling and testing and mother-to-child transmission programs, are achieving meaningful results and are cost-effective. The challenge is to expand these interventions from a pilot program basis to a national basis in a coherent and sustainable manner.

(17) Appropriate treatment of individuals with HIV/AIDS can prolong the lives of such individuals, preserve their families, prevent children from becoming orphans, and increase productivity of such individuals by allowing them to lead active lives and reduce the need for costly hospitalization for treatment of opportunistic infections caused by HIV.

(18) Nongovernmental organizations, including faith-based organizations, with experience in health care and HIV/AIDS counseling, have proven effective in com-

bating the HIV/AIDS pandemic and can be a resource in assisting indigenous organizations in severely affected countries in their efforts to provide treatment and care for individuals infected with HIV/AIDS.

(19) Faith-based organizations are making an important contribution to HIV prevention and AIDS treatment programs around the world. Successful HIV prevention programs in Uganda, Jamaica, and elsewhere have included local churches and faith-based groups in efforts to promote behavior changes to prevent HIV, to reduce stigma associated with HIV infection, to treat those afflicted with the disease, and to care for orphans. The Catholic Church alone currently cares for one in four people being treated for AIDS worldwide. Faith-based organizations possess infrastructure, experience, and knowledge that will be needed to carry out these programs in the future and should be an integral part of United States efforts.

(20)(A) Uganda has experienced the most significant decline in HIV rates of any country in Africa, including a decrease among pregnant women from 20.6 percent in 1991 to 7.9 percent in 2000.

(B) Uganda made this remarkable turnaround because President Yoweri Museveni spoke out early, breaking long-standing cultural taboos, and changed widespread perceptions about the disease. His leadership stands as a model for ways political leaders in Africa and other developing countries can mobilize their nations, including civic organizations, professional associations, religious institutions, business and labor to combat HIV/AIDS.

(C) Uganda's successful AIDS treatment and prevention program is referred to as the ABC model: "Ab-

stain, Be faithful, use Condoms", in order of priority. Jamaica, Zambia, Ethiopia and Senegal have also successfully used the ABC model. Beginning in 1986, Uganda brought about a fundamental change in sexual behavior by developing a low-cost program with the message: "Stop having multiple partners. Be faithful. Teenagers, wait until you are married before you begin sex."

(D) By 1995, 95 percent of Ugandans were reporting either one or zero sexual partners in the past year, and the proportion of sexually active youth declined significantly from the late 1980s to the mid-1990s. The greatest percentage decline in HIV infections and the greatest degree of behavioral change occurred in those 15 to 19 years old. Uganda's success shows that behavior change, through the use of the ABC model, is a very successful way to prevent the spread of HIV.

(21) The magnitude and scope of the HIV/AIDS crisis demands a comprehensive, long-term, international response focused upon addressing the causes, reducing the spread, and ameliorating the consequences of the HIV/AIDS pandemic, including—

(A) prevention and education, care and treatment, basic and applied research, and training of health care workers, particularly at the community and provincial levels, and other community workers and leaders needed to cope with the range of consequences of the HIV/AIDS crisis;

(B) development of health care infrastructure and delivery systems through cooperative and coordinated public efforts and public and private partnerships;

(C) development and implementation of national and community-based multisector strategies that address the impact of HIV/AIDS on the individual, family, community, and nation and increase the participation of at-risk populations in programs designed to encourage behavioral and social change and reduce the stigma associated with HIV/AIDS; and

(D) coordination of efforts between international organizations such as the Global Fund to Fight AIDS, Tuberculosis and Malaria, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the World Health Organization (WHO), national governments, and private sector organizations, including faith-based organizations.

(22) The United States has the capacity to lead and enhance the effectiveness of the international community's response by—

(A) providing substantial financial resources, technical expertise, and training, particularly of health care personnel and community workers and leaders;

(B) promoting vaccine and microbicide research and the development of new treatment protocols in the public and commercial pharmaceutical research sectors;

(C) making available pharmaceuticals and diagnostics for HIV/AIDS therapy;

(D) encouraging governments and faith-based and community-based organizations to adopt policies that treat HIV/AIDS as a multisectoral public health problem affecting not only health but other areas

such as agriculture, education, the economy, the family and society, and assisting them to develop and implement programs corresponding to these needs;

(E) promoting healthy lifestyles, including abstinence, delaying sexual debut, monogamy, marriage, faithfulness, use of condoms, and avoiding substance abuse; and

(F) encouraging active involvement of the private sector, including businesses, pharmaceutical and biotechnology companies, the medical and scientific communities, charitable foundations, private and voluntary organizations and nongovernmental organizations, faith-based organizations, community-based organizations, and other nonprofit entities.

(23) Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.

(24) Strong coordination must exist among the various agencies of the United States to ensure effective and efficient use of financial and technical resources within

the United States Government with respect to the provision of international HIV/AIDS assistance.

(25) In his address to Congress on January 28, 2003, the President announced the Administration's intention to embark on a five-year emergency plan for AIDS relief, to confront HIV/AIDS with the goals of preventing 7,000,000 new HIV/AIDS infections, treating at least 2,000,000 people with life-extending drugs, and providing humane care for millions of people suffering from HIV/AIDS, and for children orphaned by HIV/AIDS.

(26) In this address to Congress, the President stated the following: "Today, on the continent of Africa, nearly 30,000,000 people have the AIDS virus—including 3,000,000 children under the age of 15. There are whole countries in Africa where more than one-third of the adult population carries the infection. More than 4,000,000 require immediate drug treatment. Yet across that continent, only 50,000 AIDS victims—only 50,000—are receiving the medicine they need.".

(27) Furthermore, the President focused on care and treatment of HIV/AIDS in his address to Congress, stating the following: "Because the AIDS diagnosis is considered a death sentence, many do not seek treatment. Almost all who do are turned away. A doctor in rural South Africa describes his frustration. He says, 'We have no medicines. Many hospitals tell people, you've got AIDS, we can't help you. Go home and die.' In an age of miraculous medicines, no person should have to hear those words. AIDS can be prevented. Anti-retroviral drugs can extend life for many years * * * Ladies and gentlemen, seldom has history offered a greater opportunity to do so much for so many.".

(28) Finally, the President stated that "[w]e have confronted, and will continue to confront, HIV/AIDS in our own country", proposing now that the United States should lead the world in sparing innocent people from a plague of nature, and asking Congress "to commit $15,000,000,000 over the next five years, including nearly $10,000,000,000 in new money, to turn the tide against AIDS in the most afflicted nations of Africa and the Caribbean".

(29) On May 27, 2003, the President signed this chapter into law, launching the largest international public health program of its kind ever created.

(30) Between 2003 and 2008, the United States, through the President's Emergency Plan for AIDS Relief (PEPFAR) and in conjunction with other bilateral programs and the multilateral Global Fund has helped to—

(A) provide antiretroviral therapy for over 1,900,000 people;

(B) ensure that over 150,000 infants, most of whom would have likely been infected with HIV during pregnancy or childbirth, were not infected; and

(C) provide palliative care and HIV prevention assistance to millions of other people.

(31) While United States leadership in the battles against HIV/AIDS, tuberculosis, and malaria has had an enormous impact, these diseases continue to take a terrible toll on the human race.

(32) According to the 2007 AIDS Epidemic Update of the Joint United Nations Programme on HIV/AIDS (UNAIDS)—

(A) an estimated 2,100,000 people died of AIDS-related causes in 2007; and

(B) an estimated 2,500,000 people were newly infected with HIV during that year.

(33) According to the World Health Organization, malaria kills more than 1,000,000 people per year, 70 percent of whom are children under 5 years of age.

(34) According to the World Health Organization, 1/3 of the world's population is infected with the tuberculosis bacterium, and tuberculosis is 1 of the greatest infectious causes of death of adults worldwide, killing 1,600,000 people per year.

(35) Efforts to promote abstinence, fidelity, the correct and consistent use of condoms, the delay of sexual debut, and the reduction of concurrent sexual partners represent important elements of strategies to prevent the transmission of HIV/AIDS.

(36) According to UNAIDS—

(A) women and girls make up nearly 60 percent of persons in sub-Saharan Africa who are HIV positive;

(B) women and girls are more biologically, economically, and socially vulnerable to HIV infection; and

(C) gender issues are critical components in the effort to prevent HIV/AIDS and to care for those affected by the disease.

(37) Children who have lost a parent to HIV/AIDS, who are otherwise directly affected by the disease, or who live in areas of high HIV prevalence may be vulnerable to the disease or its socioeconomic effects.

(38) Lack of health capacity, including insufficient personnel and inadequate infrastructure, in sub-Saharan Africa and other regions of the world is a critical barrier that limits the effectiveness of efforts to combat HIV/AIDS, tuberculosis, and malaria, and to achieve other global health goals.

(39) On March 30, 2007, the Institute of Medicine of the National Academies released a report entitled "PEPFAR Implementation: Progress and Promise", which found that budget allocations setting percentage levels for spending on prevention, care, and treatment and for certain subsets of activities within the prevention category—

(A) have "adversely affected implementation of the U.S. Global AIDS Initiative";

(B) have inhibited comprehensive, integrated, evidence based approaches;

(C) "have been counterproductive";

(D) "may have been helpful initially in ensuring a balance of attention to activities within the 4 categories of prevention, treatment, care, and orphans and vulnerable children";

(E) "have also limited PEPFAR's ability to tailor its activities in each country to the local epidemic and to coordinate with the level of activities in the countries' national plans"; and

(F) should be removed by Congress and replaced with more appropriate mechanisms that—

(i) "ensure accountability for results from Country Teams to the U.S. Global AIDS Coordinator and to Congress"; and

(ii) "ensure that spending is directly linked to and commensurate with necessary efforts to achieve both country and overall performance targets for prevention, treatment, care, and orphans and vulnerable children".

(40) The United States Government has endorsed the principles of harmonization in coordinating efforts to combat HIV/AIDS commonly referred to as the "Three Ones", which includes—

(A) 1 agreed HIV/AIDS action framework that provides the basis for coordination of the work of all partners;

(B) 1 national HIV/AIDS coordinating authority, with a broadbased multisectoral mandate; and

(C) 1 agreed HIV/AIDS country-level monitoring and evaluating system.

(41) In the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, of April 26-27, 2001 (referred to in this chapter as the "Abuja Declaration"), the Heads of State and Government of the Organization of African Unity (OAU)—

(A) declared that they would "place the fight against HIV/AIDS at the forefront and as the highest priority issue in our respective national development plans";

(B) committed "TO TAKE PERSONAL RESPONSIBILITY AND PROVIDE LEADERSHIP for the activities of the National AIDS Commissions/Councils";

(C) resolved "to lead from the front the battle against HIV/AIDS, Tuberculosis and Other Related

Infectious Diseases by personally ensuring that such bodies were properly convened in mobilizing our societies as a whole and providing focus for unified national policymaking and programme implementation, ensuring coordination of all sectors at all levels with a gender perspective and respect for human rights, particularly to ensure equal rights for people living with HIV/AIDS"; and

(D) pledged "to set a target of allocating at least 15% of our annual budget to the improvement of the health sector".

2. 22 U.S.C. 7603 (Supp. IV 2010) provides:

Purpose

The purpose of this chapter is to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases as part of the overall United States health and development agenda by—

(1) establishing comprehensive, coordinated, and integrated 5-year, global strategies to combat HIV/AIDS, tuberculosis, and malaria by—

(A) building on progress and successes to date;

(B) improving harmonization of United States efforts with national strategies of partner governments and other public and private entities; and

(C) emphasizing capacity building initiatives in order to promote a transition toward greater

sustainability through the support of country-driven efforts;

(2) providing increased resources for bilateral and multilateral efforts to fight HIV/AIDS, tuberculosis, and malaria as integrated components of United States development assistance;

(3) intensifying efforts to—

(A) prevent HIV infection;

(B) ensure the continued support for, and expanded access to, treatment and care programs;

(C) enhance the effectiveness of prevention, treatment, and care programs; and

(D) address the particular vulnerabilities of girls and women;

(4) encouraging the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS, tuberculosis, and malaria;

(5) reinforcing efforts to—

(A) develop safe and effective vaccines, microbicides, and other prevention and treatment technologies; and

(B) improve diagnostics capabilities for HIV/AIDS, tuberculosis, and malaria; and

(6) helping partner countries to—

(A) strengthen health systems;

(B) expand health workforce; and

(C) address infrastructural weaknesses.

3. 22 U.S.C. 7611 (Supp. IV 2010) provides:

Development of a comprehensive, five-year, global strategy

(a) Strategy

The President shall establish a comprehensive, integrated, 5-year strategy to expand and improve efforts to combat global HIV/AIDS. This strategy shall—

(1) further strengthen the capability of the United States to be an effective leader of the international campaign against this disease and strengthen the capacities of nations experiencing HIV/AIDS epidemics to combat this disease;

(2) maintain sufficient flexibility and remain responsive to—

(A) changes in the epidemic;

(B) challenges facing partner countries in developing and implementing an effective national response; and

(C) evidence-based improvements and innovations in the prevention, care, and treatment of HIV/AIDS;

(3) situate United States efforts to combat HIV/AIDS, tuberculosis, and malaria within the broader United States global health and development agenda, establishing a roadmap to link investments in specific disease programs to the broader goals of strengthening health systems and infrastructure and to integrate and coordinate HIV/AIDS, tuberculosis, or malaria programs with other health or development programs, as appropriate;

(4) provide a plan to—

(A) prevent 12,000,000 new HIV infections worldwide;

(B) support—

(i) the increase in the number of individuals with HIV/AIDS receiving antiretroviral treatment above the goal established under section 7672(a)(3) of this title and increased pursuant to paragraphs (1) through (3) of section 7673(d) of this title; and

(ii) additional treatment through coordinated multilateral efforts;

(C) support care for 12,000,000 individuals infected with or affected by HIV/AIDS, including 5,000,000 orphans and vulnerable children affected by HIV/AIDS, with an emphasis on promoting a comprehensive, coordinated system of services to be integrated throughout the continuum of care;

(D) help partner countries in the effort to achieve goals of 80 percent access to counseling, testing, and treatment to prevent the transmission of HIV from mother to child, emphasizing a continuum of care model;

(E) help partner countries to provide care and treatment services to children with HIV in proportion to their percentage within the HIV-infected population in each country;

(F) promote preservice training for health professionals designed to strengthen the capacity of institutions to develop and implement policies

for training health workers to combat HIV/AIDS, tuberculosis, and malaria;

(G) equip teachers with skills needed for HIV/AIDS prevention and support for persons with, or affected by, HIV/AIDS;

(H) provide and share best practices for combating HIV/AIDS with health professionals;

(I) promote pediatric HIV/AIDS training for physicians, nurses, and other health care workers, through public-private partnerships if possible, including through the designation, if appropriate, of centers of excellence for training in pediatric HIV/AIDS prevention, care, and treatment in partner countries; and

(J) help partner countries to train and support retention of health care professionals and paraprofessionals, with the target of training and retaining at least 140,000 new health care professionals and paraprofessionals with an emphasis on training and in country deployment of critically needed doctors and nurses and to strengthen capacities in developing countries, especially in sub-Saharan Africa, to deliver primary health care with the objective of helping countries achieve staffing levels of at least 2.3 doctors, nurses, and midwives per 1,000 population, as called for by the World Health Organization;

(5) include multisectoral approaches and specific strategies to treat individuals infected with HIV/AIDS and to prevent the further transmission of HIV infections, with a particular focus on the needs of families with children (including the pre-

vention of mother-to-child transmission), women, young people, orphans, and vulnerable children;

(6) establish a timetable with annual global treatment targets with country-level benchmarks for antiretroviral treatment;

(7) expand the integration of timely and relevant research within the prevention, care, and treatment of HIV/AIDS;

(8) include a plan for program monitoring, operations research, and impact evaluation and for the dissemination of a best practices report to highlight findings;

(9) support the in-country or intra-regional training, preferably through public-private partnerships, of scientific investigators, managers, and other staff who are capable of promoting the systematic uptake of clinical research findings and other evidence-based interventions into routine practice, with the goal of improving the quality, effectiveness, and local leadership of HIV/AIDS health care;

(10) expand and accelerate research on and development of HIV/AIDS prevention methods for women, including enhancing inter-agency collaboration, staffing, and organizational infrastructure dedicated to microbicide research;

(11) provide for consultation with local leaders and officials to develop prevention strategies and programs that are tailored to the unique needs of each country and community and targeted particularly toward those most at risk of acquiring HIV infection;

(12) make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by—

(A) promoting abstinence from sexual activity and encouraging monogamy and faithfulness;

(B) encouraging the correct and consistent use of male and female condoms and increasing the availability of, and access to, these commodities;

(C) promoting the delay of sexual debut and the reduction of multiple concurrent sexual partners;

(D) promoting education for discordant couples (where an individual is infected with HIV and the other individual is uninfected or whose status is unknown) about safer sex practices;

(E) promoting voluntary counseling and testing, addiction therapy, and other prevention and treatment tools for illicit injection drug users and other substance abusers;

(F) educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls;

(G) supporting partner country and community efforts to identify and address social, economic, or cultural factors, such as migration, urbanization, conflict, gender-based violence, lack of empowerment for women, and transportation patterns, which directly contribute to the transmission of HIV;

(H) supporting comprehensive programs to promote alternative livelihoods, safety, and so-

cial reintegration strategies for commercial sex workers and their families;

(I) promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes; and

(J) working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children;

(13) include programs to reduce the transmission of HIV, particularly addressing the heightened vulnerabilities of women and girls to HIV in many countries; and

(14) support other important means of preventing or reducing the transmission of HIV, including—

(A) medical male circumcision;

(B) the maintenance of a safe blood supply;

(C) promoting universal precautions in formal and informal health care settings;

(D) educating the public to recognize and to avoid risks to contract HIV through blood exposures during formal and informal health care and cosmetic services;

(E) investigating suspected nosocomial infections to identify and stop further nosocomial transmission; and

(F) other mechanisms to reduce the transmission of HIV;

(15) increase support for prevention of mother-to-child transmission;

(16) build capacity within the public health sector of developing countries by improving health systems and public health infrastructure and developing indicators to measure changes in broader public health sector capabilities;

(17) increase the coordination of HIV/AIDS programs with development programs;

(18) provide a framework for expanding or developing existing or new country or regional programs, including—

(A) drafting compacts or other agreements, as appropriate;

(B) establishing criteria and objectives for such compacts and agreements; and

(C) promoting sustainability;

(19) provide a plan for national and regional priorities for resource distribution and a global investment plan by region;

(20) provide a plan to address the immediate and ongoing needs of women and girls, which—

(A) addresses the vulnerabilities that contribute to their elevated risk of infection;

(B) includes specific goals and targets to address these factors;

(C) provides clear guidance to field missions to integrate gender across prevention, care, and treatment programs;

(D) sets forth gender-specific indicators to monitor progress on outcomes and impacts of gender programs;

(E) supports efforts in countries in which women or orphans lack inheritance rights and other fundamental protections to promote the passage, implementation, and enforcement of such laws;

(F) supports life skills training, especially among women and girls, with the goal of reducing vulnerabilities to HIV/AIDS;

(G) addresses and prevents gender-based violence; and

(H) addresses the posttraumatic and psychosocial consequences and provides postexposure prophylaxis protecting against HIV infection to victims of gender-based violence and rape;

(21) provide a plan to—

(A) determine the local factors that may put men and boys at elevated risk of contracting or transmitting HIV;

(B) address male norms and behaviors to reduce these risks, including by reducing alcohol abuse;

(C) promote responsible male behavior; and

(D) promote male participation and leadership at the community level in efforts to promote HIV prevention, reduce stigma, promote participation in voluntary counseling and testing, and provide care, treatment, and support for persons with HIV/AIDS;

(22) provide a plan to address the vulnerabilities and needs of orphans and children who are vulnerable to, or affected by, HIV/AIDS;

(23) encourage partner countries to develop health care curricula and promote access to training tailored to individuals receiving services through, or exiting from, existing programs geared to orphans and vulnerable children;

(24) provide a framework to work with international actors and partner countries toward universal access to HIV/AIDS prevention, treatment, and care programs, recognizing that prevention is of particular importance;

(25) enhance the coordination of United States bilateral efforts to combat global HIV/AIDS with other major public and private entities;

(26) enhance the attention given to the national strategic HIV/AIDS plans of countries receiving United States assistance by—

(A) reviewing the planning and programmatic decisions associated with that assistance; and

(B) helping to strengthen such national strategies, if necessary;

(27) support activities described in the Global Plan to Stop TB, including—

(A) expanding and enhancing the coverage of the Directly Observed Treatment Short-course (DOTS) in order to treat individuals infected with tuberculosis and HIV, including multi-drug resistant or extensively drug resistant tuberculosis; and

(B) improving coordination and integration of HIV/AIDS and tuberculosis programming;

(28) ensure coordination between the Global AIDS Coordinator and the Malaria Coordinator and address issues of comorbidity between HIV/AIDS and malaria; and

(29) include a longer term estimate of the projected resource needs, progress toward greater sustainability and country ownership of HIV/AIDS programs, and the anticipated role of the United States in the global effort to combat HIV/AIDS during the 10-year period beginning on October 1, 2013.

(b) Report

(1) In general

Not later than October 1, 2009, the President shall submit a report to the appropriate congressional committees that sets forth the strategy described in subsection (a).

(2) Contents

The report required under paragraph (1) shall include a discussion of the following elements:

(A) The purpose, scope, methodology, and general and specific objectives of the strategy.

(B) The problems, risks, and threats to the successful pursuit of the strategy.

(C) The desired goals, objectives, activities, and outcome-related performance measures of the strategy.

(D) A description of future costs and resources needed to carry out the strategy.

(E) A delineation of United States Government roles, responsibility, and coordination mechanisms of the strategy.

(F) A description of the strategy—

(i) to promote harmonization of United States assistance with that of other international, national, and private actors as elucidated in the "Three Ones"; and

(ii) to address existing challenges in harmonization and alignment.

(G) A description of the manner in which the strategy will—

(i) further the development and implementation of the national multisectoral strategic HIV/AIDS frameworks of partner governments; and

(ii) enhance the centrality, effectiveness, and sustainability of those national plans.

(H) A description of how the strategy will seek to achieve the specific targets described in subsection (a) and other targets, as appropriate.

(I) A description of, and rationale for, the timetable for annual global treatment targets with country-level estimates of numbers of persons in need of antiretroviral treatment, country-level benchmarks for United States support for assistance for antiretroviral treatment, and numbers of persons enrolled in antiretroviral treatment programs receiving United States support. If global benchmarks are not achieved within the reporting period, the report shall include a description of steps being taken to ensure that global benchmarks will be

achieved and a detailed breakdown and justification of spending priorities in countries in which benchmarks are not being met, including a description of other donor or national support for antiretroviral treatment in the country, if appropriate.

(J) A description of how operations research is addressed in the strategy and how such research can most effectively be integrated into care, treatment, and prevention activities in order to—

(i) improve program quality and efficiency;

(ii) ascertain cost effectiveness;

(iii) ensure transparency and accountability;

(iv) assess population-based impact;

(v) disseminate findings and best practices; and

(vi) optimize delivery of services.

(K) An analysis of United States-assisted strategies to prevent the transmission of HIV/AIDS, including methodologies to promote abstinence, monogamy, faithfulness, the correct and consistent use of male and female condoms, reductions in concurrent sexual partners, and delay of sexual debut, and of intended monitoring and evaluation approaches to measure the effectiveness of prevention programs and ensure that they are targeted to appropriate audiences.

(L) Within the analysis required under subparagraph (K), an examination of additional planned means of preventing the transmission of HIV including medical male circumcision, maintenance of a safe blood supply, public education about risks to acquire

HIV infection from blood exposures, promotion of universal precautions, investigation of suspected nosocomial infections and other tools.

(M) A description of efforts to assist partner country and community to identify and address social, economic, or cultural factors, such as migration, urbanization, conflict, gender-based violence, lack of empowerment for women, and transportation patterns, which directly contribute to the transmission of HIV.

(N) A description of the specific targets, goals, and strategies developed to address the needs and vulnerabilities of women and girls to HIV/AIDS, including—

(i) activities directed toward men and boys;

(ii) activities to enhance educational, microfinance, and livelihood opportunities for women and girls;

(iii) activities to promote and protect the legal empowerment of women, girls, and orphans and vulnerable children;

(iv) programs targeted toward gender-based violence and sexual coercion;

(v) strategies to meet the particular needs of adolescents;

(vi) assistance for victims of rape, sexual abuse, assault, exploitation, and trafficking; and

(vii) programs to prevent alcohol abuse.

(O) A description of strategies to address male norms and behaviors that contribute to the transmis-

sion of HIV, to promote responsible male behavior, and to promote male participation and leadership in HIV/AIDS prevention, care, treatment, and voluntary counseling and testing.

(P) A description of strategies—

(i) to address the needs of orphans and vulnerable children, including an analysis of—

(I) factors contributing to children's vulnerability to HIV/AIDS; and

(II) vulnerabilities caused by the impact of HIV/AIDS on children and their families; and

(ii) in areas of higher HIV/AIDS prevalence, to promote a community-based approach to vulnerability, maximizing community input into determining which children participate.

(Q) A description of capacity-building efforts undertaken by countries themselves, including adherents of the Abuja Declaration and an assessment of the impact of International Monetary Fund macroeconomic and fiscal policies on national and donor investments in health.

(R) A description of the strategy to—

(i) strengthen capacity building within the public health sector;

(ii) improve health care in those countries;

(iii) help countries to develop and implement national health workforce strategies;

(iv) strive to achieve goals in training, retaining, and effectively deploying health staff;

(v) promote the use of codes of conduct for ethical recruiting practices for health care workers; and

(vi) increase the sustainability of health programs.

(S) A description of the criteria for selection, objectives, methodology, and structure of compacts or other framework agreements with countries or regional organizations, including—

(i) the role of civil society;

(ii) the degree of transparency;

(iii) benchmarks for success of such compacts or agreements; and

(iv) the relationship between such compacts or agreements and the national HIV/AIDS and public health strategies and commitments of partner countries.

(T) A strategy to better coordinate HIV/AIDS assistance with nutrition and food assistance programs.

(U) A description of transnational or regional initiatives to combat regionalized epidemics in highly affected areas such as the Caribbean.

(V) A description of planned resource distribution and global investment by region.

(W) A description of coordination efforts in order to better implement the Stop TB Strategy and to address the problem of coinfection of HIV/AIDS and tuberculosis and of projected challenges or barriers to successful implementation.

(X) A description of coordination efforts to address malaria and comorbidity with malaria and HIV/AIDS.

(c) Study of progress toward achievement of policy objectives

(1) Design and budget plan for data evaluation

The Global AIDS Coordinator shall enter into a contract with the Institute of Medicine of the National Academies that provides that not later than 18 months after July 30, 2008, the Institute, in consultation with the Global AIDS Coordinator and other relevant parties representing the public and private sector, shall provide the Global AIDS Coordinator with a design plan and budget for the evaluation and collection of baseline and subsequent data to address the elements set forth in paragraph (2)(B). The Global AIDS Coordinator shall submit the budget and design plan to the appropriate congressional committees.

(2) Study

(A) In general

Not later than 4 years after July 30, 2008, the Institute of Medicine of the National Academies shall publish a study that includes—

(i) an assessment of the performance of United States-assisted global HIV/AIDS programs; and

(ii) an evaluation of the impact on health of prevention, treatment, and care efforts that are supported by United States funding, in-

cluding multilateral and bilateral programs involving joint operations.

(B) Content

The study conducted under this paragraph shall include—

(i) an assessment of progress toward prevention, treatment, and care targets;

(ii) an assessment of the effects on health systems, including on the financing and management of health systems and the quality of service delivery and staffing;

(iii) an assessment of efforts to address gender-specific aspects of HIV/AIDS, including gender related constraints to accessing services and addressing underlying social and economic vulnerabilities of women and men;

(iv) an evaluation of the impact of treatment and care programs on 5-year survival rates, drug adherence, and the emergence of drug resistance;

(v) an evaluation of the impact of prevention programs on HIV incidence in relevant population groups;

(vi) an evaluation of the impact on child health and welfare of interventions authorized under this chapter on behalf of orphans and vulnerable children;

(vii) an evaluation of the impact of programs and activities authorized in this chapter on child mortality; and

(viii) recommendations for improving the programs referred to in subparagraph (A)(i).

(C) Methodologies

Assessments and impact evaluations conducted under the study shall utilize sound statistical methods and techniques for the behavioral sciences, including random assignment methodologies as feasible. Qualitative data on process variables should be used for assessments and impact evaluations, wherever possible.

(3) Contract authority

The Institute of Medicine may enter into contracts or cooperative agreements or award grants to conduct the study under paragraph (2).

(4) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the study under this subsection.

(d) Comptroller General report

(1) Report required

Not later than 3 years after July 30, 2008, the Comptroller General of the United States shall submit a report on the global HIV/AIDS programs of the United States to the appropriate congressional committees.

(2) Contents

The report required under paragraph (1) shall include—

(A) a description and assessment of the monitoring and evaluation practices and policies in place for these programs;

(B) an assessment of coordination within Federal agencies involved in these programs, examining both internal coordination within these programs and integration with the larger global health and development agenda of the United States;

(C) an assessment of procurement policies and practices within these programs;

(D) an assessment of harmonization with national government HIV/AIDS and public health strategies as well as other international efforts;

(E) an assessment of the impact of global HIV/AIDS funding and programs on other United States global health programming; and

(F) recommendations for improving the global HIV/AIDS programs of the United States.

(e) Best practices report

(1) In general

Not later than 1 year after July 30, 2008, and annually thereafter, the Global AIDS Coordinator shall publish a best practices report that highlights the programs receiving financial assistance from the United States that have the potential for replication or adaption, particularly at a low cost, across global AIDS programs, including those that focus on both generalized and localized epidemics.

(2) Dissemination of findings

(A) Publication on Internet website

The Global AIDS Coordinator shall disseminate the full findings of the annual best practices report on the Internet website of the Office of the Global AIDS Coordinator.

(B) Dissemination guidance

The Global AIDS Coordinator shall develop guidance to ensure timely submission and dissemination of significant information regarding best practices with respect to global AIDS programs.

(f) Inspectors General

(1) Oversight plan

(A) Development

The Inspectors General of the Department of State and Broadcasting Board of Governors, the Department of Health and Human Services, and the United States Agency for International Development shall jointly develop 5 coordinated annual plans for oversight activity in each of the fiscal years 2009 through 2013, with regard to the programs authorized under this chapter and sections 2151b-2, 2151b-3, and 2151b-4 of this title.

(B) Contents

The plans developed under subparagraph (A) shall include a schedule for financial audits, inspections, and performance reviews, as appropriate.

(C) Deadline

(i) Initial plan

The first plan developed under subparagraph (A) shall be completed not later than the later of—

(I) September 1, 2008; or

(II) 60 days after July 30, 2008.

(ii) Subsequent plans

Each of the last four plans developed under subparagraph (A) shall be completed not later than 30 days before each of the fiscal years 2010 through 2013, respectively.

(2) Coordination

In order to avoid duplication and maximize efficiency, the Inspectors General described in paragraph (1) shall coordinate their activities with—

(A) the Government Accountability Office; and

(B) the Inspectors General of the Department of Commerce, the Department of Defense, the Department of Labor, and the Peace Corps, as appropriate, pursuant to the 2004 Memorandum of Agreement Coordinating Audit Coverage of Programs and Activities Implementing the President's Emergency Plan for AIDS Relief, or any successor agreement.

(3) Funding

The Global AIDS Coordinator and the Coordinator of the United States Government Activi-

ties to Combat Malaria Globally shall make available necessary funds not exceeding $15,000,000 during the 5-year period beginning on October 1, 2008 to the Inspectors General described in paragraph (1) for the audits, inspections, and reviews described in that paragraph.

(g) Annual study

(1) In general

Not later than September 30, 2009, and annually thereafter through September 30, 2013, the Global AIDS Coordinator shall complete a study of treatment providers that—

(A) represents a range of countries and service environments;

(B) estimates the per-patient cost of antiretroviral HIV/AIDS treatment and the care of people with HIV/AIDS not receiving antiretroviral treatment, including a comparison of the costs for equivalent services provided by programs not receiving assistance under this chapter;

(C) estimates per-patient costs across the program and in specific categories of service providers, including—

(i) urban and rural providers;

(ii) country-specific providers; and

(iii) other subcategories, as appropriate.

(2) Publication

Not later than 90 days after the completion of each study under paragraph (1), the Global

AIDS Coordinator shall make the results of such study available on a publicly accessible Web site.

(h) Message

The Global AIDS Coordinator shall develop a message, to be prominently displayed by each program receiving funds under this chapter, that—

(1) demonstrates that the program is a commitment by citizens of the United States to the global fight against HIV/AIDS, tuberculosis, and malaria; and

(2) enhances awareness by program recipients that the program is an effort on behalf of the citizens of the United States.

4. 22 U.S.C. 7631 (2006 & Supp. IV 2010) provides:

Assistance to combat HIV/AIDS

(a) Omitted

(b) Authorization of appropriations

(1) In general

In addition to funds available under section 104(c) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151b(c)) for such purpose or under any other provision of that Act [22 U.S.C. 2151 et seq.], there are authorized to be appropriated to the President, from amounts authorized to be appropriated under section 7671 of this title, such sums as may be necessary for each of the fiscal years 2009 through 2013 to carry out section 104A of the Foreign Assistance Act

of 1961, as added by subsection (a) [22 U.S.C. 2151b-2].

(2) Availability of funds

Amounts appropriated pursuant to paragraph (1) are authorized to remain available until expended.

(3) Allocation of funds

Of the amount authorized to be appropriated by paragraph (1) for the fiscal years 2009 through 2013, such sums as may be necessary are authorized to be appropriated to carry out section 104A(d)(4) of the Foreign Assistance Act of 1961 (as added by subsection (a)) [22 U.S.C. 2151b-2(d)(4)], relating to the procurement and distribution of HIV/AIDS pharmaceuticals.

(c) Food and nutritional support

(1) In general

As indicated in the report produced by the Institute of Medicine, entitled "PEPFAR Implementation: Progress and Promise", inadequate caloric intake has been clearly identified as a principal reason for failure of clinical response to antiretroviral therapy. In recognition of the impact of malnutrition as a clinical health issue for many persons living with HIV/AIDS that is often associated with health and economic impacts on these individuals and their families, the Global AIDS Coordinator and the Administrator of the United States Agency for International Development shall—

(A) follow World Health Organization guidelines for HIV/AIDS food and nutrition services;

(B) integrate nutrition programs with HIV/AIDS activities through effective linkages among the health, agricultural, and livelihood sectors and establish additional services in circumstances in which referrals are inadequate or impossible;

(C) provide, as a component of care and treatment programs for persons with HIV/AIDS, food and nutritional support to individuals infected with, and affected by, HIV/AIDS who meet established criteria for nutritional support (including clinically malnourished children and adults, and pregnant and lactating women in programs in need of supplemental support), including—

(i) anthropometric and dietary assessment;

(ii) counseling; and

(iii) therapeutic and supplementary feeding;

(D) provide food and nutritional support for children affected by HIV/AIDS and to communities and households caring for children affected by HIV/AIDS; and

(E) in communities where HIV/AIDS and food insecurity are highly prevalent, support programs to address these often intersecting health problems through community-based assistance programs, with an emphasis on sustainable approaches.

(2) Authorization of appropriations

Of the amounts authorized to be appropriated under section 7671 of this title, there are authorized to be appropriated to the President such sums as may be necessary for each of the fiscal years 2009 through 2013 to carry out this subsection.

(d) Eligibility for assistance

An organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961 [22 U.S.C. 2151b-2], under this chapter, or under any amendment made by this chapter or by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, for HIV/AIDS prevention, treatment, or care—

(1) shall not be required, as a condition of receiving such assistance—

(A) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(B) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(2) shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (1).

(e) Limitation

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(f) Limitation

No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

(g) Sense of Congress relating to food assistance for individuals living with HIV/AIDS

(1) Findings

Congress finds the following:

(A) The United States provides more than 60 percent of all food assistance worldwide.

(B) According to the United Nations World Food Program and other United Nations agencies, food insecurity of individuals infected or living with HIV/AIDS is a major problem in

countries with large populations of such individuals, particularly in African countries.

(C) Although the United States is willing to provide food assistance to these countries in need, a few of the countries object to part or all of the assistance because of fears of benign genetic modifications to the foods.

(D) Healthy and nutritious foods for individuals infected or living with HIV/AIDS are an important complement to HIV/AIDS medicines for such individuals.

(E) Individuals infected with HIV have higher nutritional requirements than individuals who are not infected with HIV, particularly with respect to the need for protein. Also, there is evidence to suggest that the full benefit of therapy to treat HIV/AIDS may not be achieved in individuals who are malnourished, particularly in pregnant and lactating women.

(2) Sense of Congress

It is therefore the sense of Congress that United States food assistance should be accepted by countries with large populations of individuals infected or living with HIV/AIDS, particularly African countries, in order to help feed such individuals.

APPENDIX F

1. 45 C.F.R. 89.1 provides:

Applicability and requirements.

(a) This regulation applies to all recipients unless they are exempted from the policy requirement by the Leadership Act or other statute.

(b) The Department of Health and Human Services (HHS) components shall include in the public announcement of the availability of the grant, cooperative agreement, contract, or other funding instrument involving Leadership Act HIV/AIDS funds the requirement that recipients agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. This requirement shall also be included in the award documents for any grant, cooperative agreement or other funding instrument involving Leadership Act HIV/AIDS funds entered into with the recipient.

2. 45 C.F.R. 89.3 provides:

Organizational integrity of recipients.

A recipient must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men and children ("restricted activities"). A recipient will be found to have objective integrity and independence from such an organization if:

(a) The affiliated organization receives no transfer of Leadership Act HIV/AIDS funds, and Leadership Act HIV/AIDS funds do not subsidize restricted activities; and

(b) The recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act HIV/AIDS funds from other funds is not sufficient. HHS will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but not be limited to, the following:

(1) Whether the organization is a legally separate entity;

(2) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(3) The existence of separate accounting and timekeeping records;

(4) The degree of separation of the recipient's facilities from facilities in which restricted activities occur; and

(5) The extent to which signs and other forms of identification that distinguish the recipient from the affiliated organization are present.

APPENDIX G

[SEAL OMITTED] USAID
FROM THE AMERICAN
PEOPLE

Acquisition & Assistance Policy Directive (AAPD)

From the Director, Office of Acquisition & Assistance
Issued: Feb. 15, 2012

AAPD 12-04

Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as amended—Conscience Clause Implementation, Medically Accurate Condom Information and Opposition to Prostitution and Sex Trafficking

Subject Category: ASSISTANCE, ACQUISITION MANAGEMENT

Type: POLICY

AAPDs provide information of significance to all agency personnel and partners involved in the Acquisition and Assistance process. Information includes (but is not limited to): advance notification of changes in acquisition or assistance regulations; reminders; procedures; and general information. Also, AAPDs may be used to implement new requirements on short-notice, pending formal amendment of acquisition or assistance regulations.

AAPDs are EFFECTIVE AS OF THE ISSUED DATE unless otherwise noted in the guidance below; the directives remain in effect until this office issues a notice of cancellation.

This AAPD: ☐ Is New ☒ Replaces/ ☐ Amends CIB/AAPD No: 05-04 as amended	
Applicable to: ☒ Existing awards; ☐ Modification required ☐ No later than ☒ As noted in guidance below ☒ RFPs/RFAs issued on or after the effective date of this AAPD; all other Pending Awards, i.e. 8(a), sole source, IQC ☐ Other or N/A	Precedes change to: AIDAR Part(s) Appendix ☒ USAID Automated Directives System (ADS) Chapters 302, 303, and 308 ☐ Code of Federal Regulations 22 CFR 226 ☐ Other ☐ No change to regulations
New Provision/Clause Provided Herein X	

(signature on file)
AMAN S. DJAHANBANI

1. PURPOSE:

This Acquisition & Assistance Policy Directive (AAPD):

A. Provides contract clauses and assistance provisions to be included in contracts, grants and cooperative agreements that obligate or intend to obligate (in the case of solicitations) FY04-FY13

funds made available for HIV/AIDS activities, regardless of the program account, including:

(1) Conscience Clause Implementation (previously titled "Organizations Eligible for Assistance");

(2) Condoms; and

(3) Prohibitions on Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking.

B. Replaces all previous versions of the contract clause and assistance provision titled "Organizations Eligible for Assistance" with the revised versions in Attachments A through C, titled "Conscience Clause Implementation";

C. Provides guidance to Contracting Officers (COs) and Agreement Officers (AOs) regarding what actions to take if an organization raises a Conscience Clause objection; and

D. Replaces and supersedes in their entirety AAPD 05-04, AAPD 05-04 Amendment No. 1, AAPD 05-04 Amendment No. 2, AAPD 05-04 Amendment No. 3, PEB No. 2005-08, and PEB 2008-04.

The provisions in this AAPD impose funding restrictions that enable US AID to exercise administrative remedies should the awardee violate the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, as amended, by not complying with the terms of the award.

Required Actions:

A. COs and AOs must insert the contract clauses and assistance provisions in Attachments A, B, or C in accordance with the conditions in Section 2.A, 2.B, 2.C and 2.D.

B. COs and AOs must consider the guidance regarding "Conscience Clause Objections" in Section 2.E.

C. COs and AOs must comply with the "Organizational Integrity Guidance" in Section 2.F.

2. GUIDANCE:

A. Conditions

AOs must include the provisions in Attachments A, B or C as prescribed in Sections 2.B, 2.C and 2.D below when obligating or intending to obligate (in the case of solicitations) FY04-FY13 funds made available for HIV/AIDS activities, regardless of the program account.

B. Assistance Awards

(1) For assistance awards to Non-Governmental Organizations (NGOs) and Non-Exempt Public International Organizations[1] (PIOs) that meet the conditions set forth in Section 2.A above, AOs must include the provisions in Attachment A in each of the following:

(a) Any new Request for Applications (RFA) and Annual Program Statement (APS);

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[1] The PIOs that are statutorily exempted are listed in Section 2.F.

(b) Any new grant or cooperative agreement; and

(c) Any modification to an existing grant or cooperative agreement.

(2) For assistance awards to Alliance for Open Society International (AOSI), Pathfinder or a member of Global Health Council ("GHC"), or InterAction[2] (with the exception of DKT International, Inc.) that meet the conditions set forth in Section 2.A above, AOs must also include the language in the footnote in Attachment A, section A.3 in each of the following:

(a) Any new grant or cooperative agreement; and

(b) Any modification to an existing grant or cooperative agreement.

(3) For assistance awards to the Global Fund to Fight AIDS, Tuberculosis and Malaria[3], the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency that meet the conditions set forth in Section 2.A above, AOs must include

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[2] The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

[3] As under previous versions of AAPD 05-04, this AAPD 12-04 does not apply to USAID contributions to capital of multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

the provisions in Attachment Bin each of the following:

(a) Any new grant or cooperative agreement; and

(b) Any modification to an existing grant or cooperative agreement.

C. Contracts

1. For contracts that meet the conditions set forth in Section 2.A above, the CO must include the special provisions in Attachment C in each of the following:

(a) Any new acquisition solicitation;

(b) Any new contract;

(c) Any amendment to an existing contract; and

(d) For any Indefinite Quantity Contract (IQC), in the basic IQC contract at the time that the CO executes a new task order or an amendment to an existing task order.[4]

2. For contracts to AOSI, Pathfinder or a member of Global Health Council ("GHC"), or InterAction[5] (with the exception of DKT Inter-

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[4] The special provisions in Attachment C must be included in the IQC award. Such provisions will be deemed to apply to any order placed under the IQC for HIV/AIDS activities.

[5] The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

national, Inc.) that meet the conditions set forth in Section 2.A above, COs must also include the footnote in Attachment C, section C.3 in each of the following:

(a) Any new contract or IQC award; and

(b) Any modification to an existing contract or IQC award.

3. Personal Services Contracts (PSCs)

The special provisions in Attachment C do not apply to PSCs. During the period of their contracts, PSCs are considered federal employees for the purposes of *18 USC 202(A)*, *5 CFR part 2635*, and the *USAID General Notice entitled "Employee Review ofthe New Standards of Conduct."*

4. Grants under Contracts

If a contract provides for the contractor to execute grants to NGOs (not-for-profits or for-profits), then the AO must provide in the solicitation that the contractor must comply with the requirement to use the assistance provisions in Section 2.B of this AAPD. The contractor must do this when awarding grants under its contract (in compliance with ADS 302.3.5.6(b)).

D. Timing

(1) **Solicitations:** COs and AOs will include the solicitation provisions as prescribed in Attachments A, B or C in new assistance solicitations or acquisition solicitations that are issued on or after the effective date of this AAPD.

(2) **New awards:** COs and AOs will include the contract clauses and assistance provisions as prescribed in Attachments A, B, or C in new contracts, grants, and cooperative agreements that are executed on or after the effective date of this AAPD.

(3) **Modifications:** COs and AOs will replace all previous versions of the contract clauses and assistance provisions as prescribed in Attachments A, B, or C, when such instruments are modified on or after the effective date of this AAPD, to add funding for any reason.

This modification must be bilateral (i.e., must be signed by the US AID *AOICO* and the awardee). By signing the modification, the contractor or recipient agrees to be bound by the clause requirements. Current contracts, grants, and cooperative agreements need not be modified to include the new clauses until they are modified to add funds.

E. Conscience Clause Objections

Operating units design solicitations following evidence-based and country-specific approaches to create the most effective program with the most efficient use of resources. Linkages and referrals—across HIV/AIDS services and between HIV/AIDS programs and other health or development programs—to create multisectoral or comprehensive programs are frequently programmatically appropriate in order to achieve desired health outcomes.

Under Sections A.1, B.1 and C.1 in Attachments A, B, and C, respectively, organizations shall not be required to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS or to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection. For example, for moral or religious reasons, some organizations choose not to provide condoms or other contraceptives. To accommodate an organization's moral or religious objection as described in these sections, solicitations for HIV/AIDS programs must specify that an organization is eligible to compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award, even where the organization has a religious or moral objection to a specific activity or activities contemplated under the award. In organizing a consortium, members have flexibility to determine how to combine forces to provide comprehensive or integrated services.

Ultimately, an organization with a religious or moral objection may choose to submit an offer that does not respond to all of the specified activities. If such organization has properly notified the cognizant CO or AO of a religious or moral objection pursuant to the procedures set forth under Sections A.1(a) or C.1(a) in Attachments A and C, respectively, the offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. The cognizant CO or AO must consult GC/A&A immediately after receiving notification of a

religious or moral objection to activities in a solicitation. Depending on the specific nature of the religious or moral objection, which activities the applicant has an objection to implementing, and the design of the particular solicitation, GC will work with the relevant AO/CO and technical staff to identify an appropriate approach.

F. Organization Issues

Sections A.3(b) and C.3(b) in Attachments A and C, respectively, require organizations to state in the award that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. COs/AOs must therefore consider the "Organizational Integrity Guidance" below when determining a prospective or existing organization's eligibility or compliance with these sections. COs/AOs must also obtain clearance from Agency legal counsel before issuing any written determination relating to organizational integrity pertaining to USAID awards.

Organizational Integrity of Recipient

Organizations must state in the award that they oppose prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children. Due to organizational affiliations, such statement may be adversely implicated by the statements or activities of an affiliate of the awardee. In such cases, AOs and COs must consider the below guidance to assess whether there is such a risk. The Federal Acquisition Regulation (FAR) subpart 2.101 defines "Affiliates" as follows:

"Affiliates" means associated business concerns or individuals if, directly or indirectly—

(1) Either one controls or can control the other; or

(2) A third party controls or can control both.

There is no corresponding definition of "affiliates" in USAID assistance regulations.

Contractors and recipients of grants and cooperative agreements (hereafter collectively referred to as "Recipients") must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the Recipient's opposition to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children ("restricted activities"). A Recipient will be found to have objective integrity and independence from such an organization if:

(1) The affiliated organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize restricted activities; and

(2) The Recipient is, to the extent practicable in the circumstances, separate from the affiliated organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. USAID will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient separation exists. The presence or absence of any one or more factors relating to legal, physical, and financial separation will not be determinative. Factors relevant to this determination shall include, but are not limited to:

(a) Whether the affiliated organization is a legally separate entity;

(b) The existence of separate personnel or other allocation of personnel that maintains adequate separation of the activities of the affiliated organization from the recipient;

(c) The existence of separate accounting and timekeeping records;

(d) The degree of separation of the Recipient's facilities from facilities in which restricted activities occur; and

(e) The extent to which signs and other forms of identification that distinguish the Recipient from the affiliated organization are present.

The following organizations are statutorily-exempt from the requirement to state in their awards that they oppose the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency (the "Statutorily-Exempt Organizations"). As such, AOs for awards to Statutorily-Exempt Organizations will not need to consider the "Organizational Integrity Guidance" above.

3. **BACKGROUND**:

Attachment D includes the legislative and litigation background of this AAPD 12-04, and its predecessor AAPDs, and a brief summary of the history of the Organizational Integrity Guidance and the limited contract-

ing exception for providers of certain commercial items or services.

4. **POINTS OF CONTACT**:

USAID Contracting Officers and Agreement Officers may direct their questions about this AAPD to Jacqueline L. Taylor, M/OAA/P, Phone: (202) 567-4673; email: jltaylor@usaid.gov.

Contractors, recipients, and prospective offerors for contracts or assistance awards must direct their questions to the cognizant Contracting Officer or Agreement Officer for the award.

All other inquiries about this AAPD may be addressed to Diane Bui, GC/GH & EGAT, Phone: (202) 712-0529 e-mail: dbui@usaid.gov or to Diana Weed, GC/GH & EGAT, Phone: (202) 712- 5245 e-mail: dweed@usaid.gov.

ATTACHMENT A—Assistance Provisions—U.S. Non-Governmental Organizations (NGOs), Non-U.S. NGOs and Non-Exempt Public International Organizations (PIOs)[6]

A.1 Conscience Clause Implementation (Assistance) (February 2012)

(a) Prescription. AOs must include the following revised Standard Provision A.1(a) in any new Request for Applications (RFA) or Annual Program Statement (APS) in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD.

"CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE)—SOLICITATION PROVISION (FEBRUARY 2012)

(a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(1) Shall not be required, as a condition of receiving such assistance—

(i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/ AIDS; or

(ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

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[6] The list of statutorily exempt PIOs is included in Attachment B.

(2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.

(b) An applicant who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the cognizant Agreement Officer in accordance with the Mandatory Standard Provision titled "Notices" as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The applicant must advise which activity(ies) it could not implement and the nature of the religious or moral objection.

(c) In responding to the solicitation, an applicant with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Alternatively, such applicant may limit its application to those activities it can undertake and must indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in para-

graph (b) above, the applicant must meet the submission date provided for in the solicitation.

(End of Provision)"

(b) Prescription. AOs must include the following revised Standard Provision A.1(b) in any new assistance award, or amendment to an existing award (if not already incorporated into the agreement), to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

"CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(a) Shall not be required, as a condition of receiving such assistance—

(1) To endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(2) To endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or coopera-

tive agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)"

A.2 Condoms (Assistance) (June 2005)

Prescription. (Note: This provision remains unchanged from the version in AAPD 05-04, so it retains the same title and effective date.) AOs must include the following Standard Provision in any new Request for Applications (RFA) or Annual Program Statement (APS), and any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to U.S. NGOs, non-U.S. NGOs, or non-exempt PIOs in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards, procurement contracts or subcontracts.

"CONDOMS (ASSISTANCE) (JUNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with US AID's fact sheet entitled, "US AID HIV/STI Prevention and Condoms. This fact sheet may be accessed at:

http://www.usaid.gov/our_work/global_health/aids/TechAreas/prevention/condomfactsheet.html.

(End of Provision)"

ATTACHMENT B—Assistance Provisions—The Global Fund to Fight AIDS, Tuberculosis and Malaria[8], the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency

B.1 Conscience Clause Implementation (Assistance) (February 2012)

Prescription. AOs must include the following revised Standard Provision B.1 in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards.

"CONSCIENCE CLAUSE IMPLEMENTATION (ASSISTANCE) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(a) Shall not be required, as a condition of receiving such assistance-

(1) to endorse or utilize a multi sectoral or comprehensive approach to combating HIV/ AIDS; or

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[8] As under AAPD 05-04, this AAPD 12-04 does not apply to USAID contributions to capital of multi donor trust funds. such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

(2) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)"

B.2 Condoms (Assistance) (June 2005)

Prescription. (Note: This provision remains unchanged from original AAPD 05-04, dated June 9, 2005, so it retains the same title and effective date.) AOs must include the following Standard Provision in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards.

"CONDOMS (ASSISTANCE) (JUNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this agreement shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID's fact sheet entitled, "USAID HIV/STI Prevention and Condoms. This fact sheet may be accessed at:

http://www.usaid.gov/our_work/global_health/aids/TechAreas/prevention/condomfactsheet.html.

(End of Provision)"

B.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Assistance—the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative and any United Nations agency) (April 2010)

Prescription. (Note: This provision remains unchanged from the version in AAPD 05-04 Amendment 3, dated April 13, 2010, so it retains the same title and effective date.) AOs must include the following Standard Provision in any new assistance award or amendment to an existing award (if not already incorporated into the agreement) to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime recipient must flow this provision down in all subawards.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE—THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, THE WORLD HEALTH ORGANIZATION, THE INTERNATIONAL AIDS VACCINE INITIATIVE, AND ANY UNITED NATIONS AGENCY) (APRIL 2010)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) The following definitions apply for purposes of this provision:

"Commercial sex act" means any sex act on account of which anything of value is given to or received by any person.

"Prostitution" means procuring or providing any commercial sex act and the "practice of prostitution" has the same meaning.

"Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(c) The recipient shall insert this provision, which is a standard provision, in all subawards.

(d) This provision includes express terms and conditions of the award and any violation of it shall be grounds for unilateral termination of the award by US AID prior to the end of its term.

(End of Provision)"

ATTACHMENT C—Acquisition Provisions

C.1 Conscience Clause Implementation (Acquisition) (February 2012)

(a) Prescription. COs must include the following revised Special Provision C.1(a) in any new acquisition solicitation in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD.

"CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION)—SOLICITATION PROVISION (FEBRUARY 2012)

(a) An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(1) Shall not be required, as a condition of receiving such assistance—

(i) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(ii) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(2) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a)(1) above.

(b) An offeror who believes that this solicitation contains provisions or requirements that would require it to endorse or use an approach or participate in an activity to which it has a religious or moral objection must so notify the cognizant Contracting Officer in accordance with AIDAR 752.7006 (Notices) as soon as possible, and in any event not later than 15 calendar days before the deadline for submission of applications under this solicitation. The offeror must advise which activity(ies) it could not implement and the nature of the religious or moral objection.

(c) In responding to the solicitation, an offeror with a religious or moral objection may compete for any funding opportunity as a prime partner, or as a leader or member of a consortium that comes together to compete for an award. Alternatively, such offeror may limit its proposal to those activities it can undertake and should indicate in its submission the activity(ies) it has excluded based on religious or moral objection. The offeror's proposal will be evaluated based on the activities for which a proposal is submitted, and will not be evaluated favorably or unfavorably due to the absence of a proposal addressing the activity(ies) to which it objected and which it thus omitted. In addition to the notification in paragraph (b) above, the offeror must meet the submission date provided for in the solicitation.

(End of Provision)"

(b) Prescription. COs must include the following revised Special Provision C.1(b) in any new acquisition

award or amendment to an existing acquisition award (if not already incorporated into the agreement), to contractors in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime contractor must flow this provision down in all subcontracts.

"CONSCIENCE CLAUSE IMPLEMENTATION (ACQUISITION) (FEBRUARY 2012)

An organization, including a faith-based organization, that is otherwise eligible to receive funds under this agreement for HIV/AIDS prevention, treatment, or care—

(a) Shall not be required, as a condition of receiving such assistance—

(1) to endorse or utilize a multi sectoral or comprehensive approach to combating HIV/AIDS; or

(2) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(b) Shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements for refusing to meet any requirement described in paragraph (a) above.

(End of Provision)"

C.2 Condoms (Acquisition) (June 2005)

Prescription. (Note: This provision remains unchanged from the version in original AAPD 05-04, dated June 9,

2005, so it retains the same title and effective date.) COs must include the following Special Provision in any new acquisition solicitation, and any new acquisition award or amendment to an existing award (if not already incorporated into the award) in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD. The prime contractor must flow this provision down in all subcontracts.

"CONDOMS (ACQUISITION) (WNE 2005)

Information provided about the use of condoms as part of projects or activities that are funded under this contract shall be medically accurate and shall include the public health benefits and failure rates of such use and shall be consistent with USAID's fact sheet entitled, "USAID HIV/STI Prevention and Condoms. This fact sheet may be accessed at:

http://www.usaid.gov/our_work/global_health/aids/TechAreas/prevention/condomfactsheet.html.

(End of Provision)"

C.3 Prohibition on the Promotion or Advocacy of the Legalization or Practice of Prostitution or Sex Trafficking (Acquisition) (April 2010)

Prescription. This provision remains unchanged from the version in AAPD 05-04 Amendment 3, dated April 13, 2010, so it retains the same title and effective date.) COs must include the following Special Provision in any new acquisition solicitation, and any new acquisition award or amendment to an existing award (if not already incorporated into the award) in accordance with the guidance set forth in Sections 2.A-2.D of this AAPD.

The prime contractor must flow this provision down in all subcontracts.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ACQUISITION) (APRIL 2010)

(a) This contract is authorized under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Pub. L. No. 108-25), as amended. This Act enunciates that the U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. The contractor shall not use any of the funds made available under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b)(1) Except as provided in (b)(2) and (b)(3), by its signature of this contract or subcontract for HIV/ AIDS activities, a non-governmental organization or public international organization awardee/ subawardee agrees that it is opposed to the practices of prostitution and sex traffick-

ing because of the psychological and physical risks they pose for women, men, and children.[9]

(2) The following organizations are exempt from (b)(1): the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency.

(3) Contractors and subcontractors are exempt from (b)(1) if the contract or subcontract is for commercial items and services as defined in FAR 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding.

(4) Notwithstanding section (b)(3), not exempt from (b)(1) are contractors and subcontractors that implement HIV/AIDS programs under this contract or subcontract by:

(i) providing supplies or services directly to the final populations receiving such supplies or services in host countries;

(ii) providing technical assistance and training directly to host country individuals or entities on the provision of supplies or services

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[9] The following footnote should only be included in awards to Alliance for Open Society International (AOSI), Pathfinder, or a member of GHC or InterAction (with the exception of DKT International, Inc.):

"Any enforcement of this clause is subject to Alliance for Open Society International v. USAID, 05 Civ. 8209 (S.D.N.Y., orders filed on June 29, 2006 and August 8, 2008) (orders granting preliminary injunction) for the term of the Orders."

to the final populations receiving such supplies and services; or

(iii) providing the types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in (i) and (ii), or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services approving financial transactions, personnel actions).

(c) The following definitions apply for purposes of this provision:

"Commercial sex act" means any sex act on account of which anything of value is given to or received by any person.

"Prostitution" means procuring or providing any commercial sex act and the "practice of prostitution" has the same meaning.

"Sex trafficking" means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The contractor shall insert this provision in all subcontracts.

(e) Any violation of this provision will result in the immediate termination of this award by USAID.

(f) This provision does not affect the applicability of FAR 52.222-50 to this contract.

(End of Provision)"

The lists of members of GHC and InterAction can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

ATTACHMENT D – Background

A. Leadership Act Statutory Provisions:

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25 (2003) (the "Leadership Act") authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2004-2008. The Leadership Act was reauthorized by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293 (2008) (the "Reauthorization Act"), which authorized funds to be appropriated for HIV/AIDS activities for the fiscal years 2009-2013. The Leadership Act, as amended, includes, among other things, certain restrictions on the award and use of funds for HIV/AIDS activities, and requires recipients of those funds to have certain policies in place.

The Leadership Act was amended by the Consolidated Appropriations Act of 2004, Division D – Foreign Operations, Export Financing, and Related Programs Appropriations ("FY 04 Appropriations Act"), Title II – Bilateral Economic Assistance, United States Agency for International Development, Child Survival and Health Programs Fund to exempt the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative, and any United Nations agency from certain requirements.

Section 301 of the Leadership Act, as amended, entitled "Assistance to Combat HIV/AIDS," includes the following provisions:

"(d) ELIGIBILITY FOR ASSISTANCE. – An organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961, under this Act, or under any amendment made by this Act or by the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, for HIV/AIDS prevention, treatment, or care—

(1) shall not be required, as a condition of receiving such assistance—

(A) to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(B) to endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection; and

(2) shall not be discriminated against in the solicitation or issuance of grants, contracts, or cooperative agreements under such provisions of law for refusing to meet any requirement described in paragraph (1).

(e) LIMITATION. – No funds made available to carry out this Act, or any amendment made by this Act, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and neces-

sary pharmaceuticals and commodities, including test kits, condoms, and when proven effective, microbicides.

(f) LIMITATION. – No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency."

During legislative debate on the Leadership Act, in response to a question from Senator Leahy on the Senate floor regarding provision (f) above, Senator Frist stated that "a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women . . . would satisfy the intent of the provision." 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Frist).

The Statement of Managers of the FY 04 Appropriations Act states that the conferees "intend that for purposes of this provision, the World Health Organization includes its six regional offices: The Americas (PAHO); South-East Asia (SEARO); Africa (AFRO); Eastern Mediterranean (EMRO); Europe (EURO); and Western Pacific (WPRO)."

Although the above-named public international organizations are exempt from section 301(f) of the Leadership Act, they are subject to the AAPD 12-04 provisions that implement sections 301(d) and (e) of the Leadership Act,

as amended. However, as under AAPD 05-04, this AAPD 12-04 does not apply to USAID contributions to capital of multidonor trust funds, such as to the Trust Fund for the Global Fund to Fight AIDS, Tuberculosis and Malaria.

B. Leadership Act Litigation

Alliance for Open Society International ("AOSI")/Pathfinder International ("Pathfinder") – U.S. District Court for the Southern District of New York:

On June 29, 2006, the District Court for the Southern District of New York issued a preliminary injunction order, pending a final judgment on the merits, prohibiting Defendants USAID and HHS from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder.

Defendants also were prohibited from investigating or auditing AOSI or Pathfinder regarding compliance with this statutory requirement.

On August 7, 2008, the Court granted the request of two associations, Global Health Council ("GHC") and InterAction, to be added as plaintiffs in the AOSI suit and extended the reach of the preliminary injunction to cover the members of those associations as well.

Therefore, in addition to being prohibited from enforcing the statutory requirement to have a policy opposing prostitution and sex trafficking against AOSI or Pathfinder, USAID and HHS are now prohibited from enforcing this statutory requirement against any member of GHC or InterAction. They are likewise forbidden from investigating or auditing members of GHC or In-

terAction regarding compliance with this statutory requirement.

GHC and InterAction have provided USAID with lists of member organizations, and these lists can be found at: [http://www.usaid.gov/business/business_opportunities/cib/pdf/GlobalHealthMemberlist.pdf].

DKT International, Inc. ("DKT") – D.C. Circuit Court of Appeals:

Although DKT is a member of GHC, the D.C. Circuit Court of Appeals previously held in a separate lawsuit that USAID may enforce the statutory requirement to have a policy opposing prostitution and sex trafficking against DKT. In its order, the District Court for the Southern District of New York specifically barred DKT from benefiting from the preliminary injunction. Therefore, USAID continues to enforce the statutory requirement against DKT.

C. Organizational Integrity Guidance

In July 2007, USAID issued guidance designed to provide additional clarity for COs and AOs regarding the application of Section 301(f) of the Leadership Act.

This clarifying guidance was also issued to Contracting Specialists, Contracting Officers' Technical Representatives (COTRs) and Agreement Officers' Technical Representatives (AOTRs), Health Officers, and USAID's implementing partners (e.g., grantees, recipients and contractors).

The guidance noted that in enacting the Leadership Act, Congress developed a framework to combat the global spread of HIV/AIDS, tuberculosis, and malaria. The

Leadership Act provides that all HIV/AIDS funding recipients, subject to limited exceptions, must have a policy explicitly opposing prostitution and sex trafficking. The guidance noted it is critical to the effectiveness of Congress's plan and to the U.S. Government's foreign policy underlying this effort, that the integrity of Leadership Act HIV/AIDS programs and activities implemented by organizations receiving Leadership Act HIV/AIDS funds is maintained, and that the U.S. Government's message opposing prostitution and sex trafficking is not confused by conflicting positions of implementing organizations.

Accordingly, USAID provided Organizational Integrity Guidance in AAPD 05-04 Amendment No. 1, and Amendment No. 3 to AAPD 05-04 modified that Organizational Integrity Guidance.

The guidance clarified that the Government's organizational partners that have agreed that they oppose prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children, may, consistent with the policy requirement, maintain an affiliation with separate organizations that do not satisfy the policy requirement, provided that such affiliations do not threaten the integrity of the Government's programs and its message opposing prostitution and sex trafficking, as specified in this guidance. To maintain program integrity, adequate separation is required between any federally funded partner organization and an affiliate that engages in activities inconsistent with a policy against prostitution and sex trafficking.

The criteria for affiliate independence are modeled on criteria upheld as constitutional by the U.S. Court of Appeals for the Second Circuit in *Velazquez v. Legal Services Corporation*, 164 F. 3d 757, 767 (2d Cir. 1999), and *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F. 3d 219, 229-33 (2d Cir. 2006), cases involving similar organization-wide limitations applied to recipients of federal funding.

A recipient of Leadership Act HIV/AIDS funds may maintain an affiliation with an independent organization that engages in activities inconsistent with an opposition to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children while remaining in compliance with the policy requirement.

The independent affiliate's position on these issues will have no effect on the recipient organization's eligibility for Leadership Act HIV/AIDS funds, so long as the affiliate satisfies the criteria for objective integrity and independence, as detailed in the guidance. By ensuring adequate separation between the recipient and affiliate organizations, these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the Government, thereby avoiding the risk of confusing the Government's message opposing prostitution and sex trafficking.

D. Limited Contracting Exception for Providers of Certain Commercial Items or Services:

In October 2007, the contract provision implementing Sections 301(e) and 301(f) of the Leadership Act was amended in AAPD 05-04 Amendment No. 2 to provide a

limited exemption from the policy requirement contained in Section 301(f) (the "policy requirement") for certain contracts and subcontracts for specific types of items and services. The provision exempts from the policy requirement contractors and subcontractors who are providing commercial items or services and where such activities do not involve any HIV/AIDS programmatic activities per se.

The Leadership Act policy requirement remains applicable to all contractors and subcontractors who directly implement HIV/AIDS programs by providing:

(1) Supplies or services directly to the final populations receiving such supplies or services in host countries:

(2) Technical assistance and training directly to host country individuals or organizations on how supplies or services are provided to the final populations receiving such supplies and services; or

(3) The types of services listed in FAR 37.203(b)(1)-(6) that involve:

- giving advice about substantive policies of a recipient,
- giving advice regarding the activities referenced in (1) and (2), or
- making decisions or functioning in a recipient's chain of command.

No. 12-10

IN THE

Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly determined that Respondents are likely to succeed on their claim that the First Amendment prohibits the government from requiring grantees, as a condition of receiving federal funds, to adopt and express as their own the government's viewpoint on an issue of public debate, while also prohibiting grantees from expressing any views or undertaking any activity, even with private funds, "inconsistent with" the government's viewpoint.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

This case presents a challenge to a single provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. § 7601. That provision, as implemented by the government, requires recipients of Leadership Act funds to adopt a policy explicitly opposing prostitution and prohibits them from expressing any views or engaging in any activities the government deems "inconsistent" with the policy. This Policy Requirement, as it is known, applies to grantees in their entirety, including their privately funded speech and programs.

Respondents challenged the Policy Requirement as a violation of their First Amendment right to free speech. The Second Circuit affirmed a preliminary injunction enjoining enforcement of the Policy Requirement, concluding that Respondents were likely to prevail on the merits of their First Amendment claims because the Policy Requirement "falls well beyond what the Supreme Court ... [has] upheld as permissible conditions on the receipt of government funds." Pet. App. 25a. The court of appeals reasoned that—although the Policy Requirement was enacted under Congress's spending power—it likely violates the First Amendment because it forces Respondents to adopt and espouse as their own the government's viewpoint, and applies to Respondents in their entirety, even restricting private speech and activities undertaken with purely private funds.

The Second Circuit's interlocutory decision is correct, does not create a "square circuit conflict," and is consistent with the decisions of this Court. The petition should therefore be denied.

A. The Leadership Act And The Policy Requirement

In 2003, Congress enacted the Leadership Act to fight the HIV/AIDS pandemic. The statute's stated purpose is "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases." 22 U.S.C. § 7603.

The Leadership Act seeks to fulfill that purpose by preventing new infections, treating HIV-positive persons, and caring for people whose lives have been affected by HIV/AIDS. The statute devotes billions of

dollars to a variety of activities designed to achieve these goals. The statute makes no reference to a messaging campaign. *See infra* II.4.b.

The Leadership Act places a host of conditions on the *use* of federal funds.[1] All of these conditions are imposed on the funds themselves and thus have no impact beyond the scope of federally funded programs. In contrast, the Policy Requirement imposes conditions not on federal funds, but rather on the grantee organizations that receive federal funds. The Policy Requirement states that Leadership Act funds shall not be available to "any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f). This provision requires grantees to adopt and espouse as their own a policy explicitly opposing prostitution.

Notably, the Leadership Act expressly exempts some grantees from the Policy Requirement, which "shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization ("WHO"), the International AIDS Vaccine Initiative, or to any United Nations agency." 22 U.S.C. § 7631(f). Indeed, the WHO and UNAIDS, recipients of Leadership Act funds, have "taken a public position at odds with the Policy Requirement, recognizing the reduction of penalties for prostitution as a best practice in the fight against HIV/AIDS." Pet. App. 33a.

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[1] *See, e.g.*, 22 U.S.C. § 7631(e) (barring use of government funds "to promote or advocate the legalization or practice of prostitution or sex trafficking"); 22 U.S.C. § 7655(f) ("not more than 7 percent of the amount of a grant received under this section ... [may be] used for administrative expenses").

In April 2010, Petitioners United States Agency for International Development ("USAID") and Department of Health and Human Services ("HHS") issued implementing regulations that further prohibit any part of a grantee organization—even privately funded parts—from "engag[ing] in activities that are inconsistent with their opposition to prostitution and sex trafficking." 75 Fed. Reg. 18,760 (Apr. 13, 2010) (the "Guidelines"). The Guidelines do not define the phrase "inconsistent with their opposition to prostitution."

The Policy Requirement applies to each grantee organization *in its entirety*. The entire grantee organization—encompassing all of its parts and programs—must affirmatively adopt and espouse as its own the government's viewpoint on prostitution. The Policy Requirement thus controls not only the organization's federally funded speech and activities, but also its *privately funded* speech and activities. In fact, because other separate Leadership Act provisions and regulations—which Respondents do not challenge—already control the use of government funds,[2] the Policy Requirement's impact falls squarely on privately funded speech and activities.

B. The Respondents

In the Leadership Act, Congress recognized that government partnerships with nongovernmental organizations ("NGOs"), such as Respondents, are "critical to the success of the international community's efforts to combat HIV/AIDS and other infectious diseas-

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[2] *See, e.g.*, 22 U.S.C. § 7631(e) (barring use of federal funds "to promote or advocate the legalization or practice of prostitution or sex trafficking").

es around the globe." 22 U.S.C. § 7621(a)(4). Accordingly, the Leadership Act seeks to expand "public-private partnerships" and to "include multisectoral approaches" to the fight against HIV/AIDS. 22 U.S.C. § 7603(a)(5), (a)(9), (4).

Respondents are U.S.-based NGOs that run a wide variety of public health programs as part of the global fight against HIV/AIDS.[3]

Respondent Pathfinder is a reproductive health organization that operates in more than twenty countries and uses Leadership Act funds to prevent HIV/AIDS and treat and care for its victims. As of the filing of this action, Pathfinder ran programs that: prevent mother-to-child HIV transmission in Kenya; improve treatment of the disease in Bangladesh by aiding local NGOs to become "technically and managerially self-sufficient in the provision of essential health services"; expand home-based care programs for HIV victims in Tanzania; and increase psychosocial and peer counseling services in Botswana.

Respondent InterAction comprises the largest alliance of U.S.-based international development and humanitarian NGOs, many of which promote public health. For example, InterAction member Cooperative for Assistance and Relief Everywhere, Inc. ("CARE") uses Leadership Act funds to treat and care for AIDS orphans and other children affected by or infected with HIV in Africa.

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[3] In addition to receiving U.S. government funding under the Leadership Act, Respondents also receive significant funding from private donors, foreign governments such as Sweden, Canada, and the Netherlands, and international organizations such as the World Bank and the United Nations.

As of the filing of this action, Respondent AOSI used Leadership Act funds to run a program in Central Asia to stop the spread of HIV/AIDS, for example, "[b]y preventing injection drug use."[4]

C. The Policy Requirement's Effect On Respondents' Work To Fight HIV/AIDS

Successful efforts to fight HIV/AIDS often involve organizing and working cooperatively with marginalized "high-risk" groups, such as prostitutes. For example, the WHO and the United Nations have said that, in some regions, the most effective HIV prevention efforts require advocating changes to laws and policies to prevent prostitutes from going "underground" and avoiding treatment and care. CAJA 61-64.

Respondents' work in fighting HIV/AIDS includes engaging in various outreach efforts and cooperative activities with these marginalized groups. This work includes Respondent CARE's sex worker peer education programs in Bangladesh and India; Respondent Pathfinder's efforts to organize prostitutes in India so they can collectively agree to engage in HIV prevention; and Respondent Pathfinder's outreach to sex workers in bars and clubs to provide public health information and health services. UNAIDS and the WHO have praised some of these programs as best practices for prevention strategies. *See, e.g.*, CAJA 882 ¶ 23.

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[4] As of the filing of this action, Respondent Global Health Council ("GHC") was the largest alliance of organizations dedicated to international public health; it temporarily suspended its operations in June 2012, with the hope of resuming [its] work in the future." http://www.globalhealth.org (last accessed Dec. 12, 2012).

In order for this work to succeed, Respondents generally avoid taking policy positions or making statements that are likely to offend host nations, partner organizations, or groups that Respondents seek to influence and help. Respondents recognize the health risks and other harms associated with prostitution. They also believe, however, based on experience that adopting a policy that explicitly opposes prostitution would jeopardize Respondents' effectiveness in working with high-risk groups to fight HIV/AIDS. *See, e.g.*, CAJA 882, 884 ¶¶ 23, 26; CAJA 847-48 ¶ 25. Because the Policy Requirement bars any speech or activities the government deems "inconsistent with" an anti-prostitution policy, it effectively prevents Respondents from using even their own *private* funds to work cooperatively with prostitutes or advocate legal and policy changes—or even discuss such issues. As a result, the Policy Requirement impedes Respondents' efforts to conduct privately funded HIV/AIDS prevention work in accordance with widely recognized best public health practices. Similarly, the Policy Requirement impairs Respondents' ability to use private funds to discuss their HIV/AIDS work and research at public health conferences, in publications, and on websites.

D. Procedural Background

The government did not enforce the Policy Requirement against U.S.-based organizations for more than a year after the Act went into effect. At that time, the Department of Justice's Office of Legal Counsel ("OLC") opined in a written memorandum that applying the Policy Requirement to U.S. organizations would be unconstitutional. *See* CAJA 143 n.10, 155-156. The government litigated for years in an effort to keep the OLC memorandum from becoming public, and finally disclosed it in November 2012 only in response to a

court order issued two months earlier. *See Brennan Ctr. for Justice* v. *Department of Justice*, 697 F.3d 184 (2d Cir. 2012). Notably, OLC concludes in the memorandum—albeit tentatively—that the Policy Requirement's "organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs [] *cannot be constitutionally applied to U.S. organizations*." App. 1a (emphasis supplied). In 2005, for reasons that have never been publicly explained, OLC issued a second opinion in which it changed its view; shortly thereafter, the government began enforcing the Policy Requirement against U.S.-based organizations.

AOSI and Pathfinder sued Petitioners in 2005 to enjoin the Policy Requirement because it violates their First Amendment rights. Respondents do not challenge any restrictions the government places on the use of Leadership Act funds; rather, they challenge only the Policy Requirement and implementing regulations that compel them to adopt and espouse *as their own* a certain viewpoint, and to prohibit "inconsistent" speech and activities, even if undertaken with private funds outside the scope of any federally-funded program.

In May 2006, the district court entered a preliminary injunction, holding that the Policy Requirement likely violates the First Amendment. Pet. App. 112a-219a. The government appealed in August 2006. After the parties briefed the appeal, the government effectively mooted its own appeal and avoided review by announcing for the first time at oral argument in June 2007 that it intended to issue guidelines implementing the Policy Requirement. *AOSI* v. *USAID*, 254 F. App'x 843, 846 (2d Cir. 2007). Those guidelines, issued the next month in July 2007, allowed grantees to affili-

ate with separate organizations that could engage in "activities inconsistent with the recipient's opposition to ... prostitution," but they required "objective integrity and independence" from such affiliates and failed to define activities "inconsistent" with an opposition to prostitution. *See* 45 C.F.R. § 89.3. In August 2007, the Second Circuit ordered a second round of briefing, and in November of that year remanded in light of the guidelines. *Id.*

In August 2008, the district court ruled on remand that the guidelines did not cure the Policy Requirement's constitutional defects because "the clause requiring [Respondents] to adopt the government's view regarding the legalization of prostitution remains intact," and the guidelines imposed significant burdens on Respondents. Pet. App. 10a (internal quotation marks omitted). Granting a motion to amend the complaint, the district court also extended injunctive relief to two new plaintiffs, Respondents GHC and InterAction.

In October 2008, the government appealed again. In January 2009, just five days before a change in administrations, the government filed its brief in the Second Circuit. With its own appeal pending, the government again issued new regulations, which took effect on Inauguration Day in January 2009. In July 2009, on the eve of the deadline for Respondents' brief to the Second Circuit, the government again announced its intent to revise the regulations. Days later, the parties stipulated to the withdrawal of the government's appeal subject to reinstatement by January 2010.

In January 2010, the government reinstated its appeal. In April 2010, with the government's own appeal pending again, HHS and USAID issued almost identical amended regulations. The new Guidelines, 45

C.F.R. § 89, permit grantees to affiliate with other entities that do not receive federal funds, but they do not cure the constitutional infirmities identified by the district court. Grantees are still required to adopt and espouse as their own the government's policy opposing prostitution. And they are still prohibited from saying or doing anything the government deems "inconsistent" with that viewpoint. Pet. App. 297a. The parties briefed and argued the appeal in 2010.

In July 2011, the Second Circuit affirmed the preliminary injunction, holding that the Policy Requirement violates the First Amendment by compelling funding recipients to adopt the required policy and espouse the government's viewpoint as a condition of receiving federal funding. Pet. App. 36a. The court found that the Policy Requirement "pushes considerably further" than any Spending Clause condition previously held by this Court to be constitutional. Pet. App. 25a.

The Second Circuit rejected the government's arguments under *Rust* v. *Sullivan*, 500 U.S. 173 (1991). The court held that the Policy Requirement goes "well beyond" the limitations upheld in *Rust*, "because it compels Plaintiffs to voice the government's viewpoint and to do so as if it were their own," whereas the funding condition in *Rust* did not require a funding recipient to represent as his own any opinion it did not actually hold. Pet. App. 31a.

The Second Circuit also held that the Policy Requirement could not be justified under the government speech doctrine. The Second Circuit ruled that "[t]he stated purpose of the Leadership Act is to fight HIV/AIDS, as well as tuberculosis and malaria" and could not be "recast" as "an anti-prostitution messaging campaign." Pet. App. 33a. The court rejected the gov-

ernment's argument that anti-prostitution policy statements are "integral" to the Leadership Act's goal, ruling that such a contention was "undermined by the fact that the government has chosen to fund high-profile, global organizations"—the WHO, the United Nations, the Global Fund to Fight AIDS, Tuberculosis and Malaria, and the International AIDS Vaccine Initiative—"that remain free to express openly a contrary policy, or no policy at all." Pet. App. 33a-34a.

Additionally, the court held that the Guidelines, which permit funding recipients to set up physically and financially separate affiliates, do nothing to address the fact that the Policy Requirement compels speech and discriminates based on viewpoint.

Judge Straub dissented, asserting that the Leadership Act was designed to convey a government message and should be upheld under *Rust*. Pet. App. 37a-96a. But the dissent mistakenly assumed that the Policy Requirement is "cabined to the federal subsidy program" (Pet. App. 55a-56a) and therefore "does not restrict [Respondents'] First Amendment speech outside of the scope of the Leadership Act program" (Pet. App. 77a).

The Second Circuit denied the government's petition for rehearing en banc, with three judges dissenting. Pet. App. 98a-111a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO "SQUARE CIRCUIT CONFLICT"

The government argues that the decision below presents a "square circuit conflict" with *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (D.C. Cir. 2007) ("*DKT*"). The *DKT* court, however, assessed the constitutionality of the Policy Requirement in the context of a hypothetical

set of facts that never came to pass. There is no reason to believe that the D.C. Circuit, if faced with the same facts and legal questions in this case, would have resolved the question presented here any differently from the Second Circuit.

1. The factual predicates for the decisions of the Second Circuit and D.C. Circuit differ in two significant ways. First, DKT challenged the Policy Requirement before the government promulgated the Guidelines. Importantly, the government represented to the D.C. Circuit at oral argument that grantees would be able to express their privately funded views through subsidiaries that would not be subject to the Policy Requirement. The government maintained that grantees could "just spin[] off a subsidiary corporation," and "[a]ll of [DKT's] complaints could be solved through a corporate reorganization." *DKT*, 477 F.3d at 763 n.4.

The D.C. Circuit based a significant portion of its opinion on the government's vague assurances regarding a hypothetical affiliate scheme that never actually materialized. The *DKT* court acknowledged that *Rust* "stressed" the constitutional significance of the fact that the restriction at issue there applied only to federally funded *programs* and not to entire grantees. *See* 477 F.3d at 763. Yet, the D.C. Circuit found that, given the close nature of relationships between parent and subsidiary companies, and given the purported ease with which a grantee could establish such a subsidiary, the grantee and subsidiary were tantamount to separate *programs* within a larger, unified entity, and thus the Policy Requirement did not run afoul of *Rust* in that respect. *See id.* The DKT court's reasoning on this point was explicitly, and solely, based on its mistaken assumptions about the contours of the government's hypothetical separation requirements. *Id.*

As we now know, those hypothetical separation requirements never came to pass. Instead, the government issued separation requirements that are different in kind and considerably more burdensome. The actual Guidelines do not say that the Policy Requirement applies only to federally funded programs. To the contrary, the Guidelines still require recipients to adopt entity-wide policies opposing prostitution. In addition, they demand that a grantee must be separate "to the extent practicable" from an undefined "affiliated organization that engages in activities inconsistent with the recipient's opposition to the practice[] of prostitution." CASPA 188-189, 203-204. Whether a grantee and affiliate are sufficiently "separate" depends on a vague, case-by-case balancing of five non-exclusive factors: separate personnel, legal status, physical facilities, accounts, and records. *Id.*

These factors impose significant burdens on Respondents, which operate in many foreign countries with disparate legal regimes. Often, the countries in which Respondents operate have significant hurdles to establishing and operating NGOs, such as complex registration requirements and restrictive visa approvals, which makes the creation and operation of an affiliate organization extremely burdensome in some cases, and nearly impossible in others. *See, e.g.*, CASPA 175; CAJA 719-720 ¶¶ 46-49; CAJA 850-851 ¶¶ 33-34; CAJA 887-889 ¶¶ 32-36; CAJA 899-900 ¶¶ 33-34; CAJA 906-928 ¶¶ 12-67. It is indisputable that the burdens imposed by the Guidelines are far more onerous than the hypothetical guidelines in *DKT* that supposedly would have permitted grantees to "just spin off a subsidiary," *DKT*, 477 F.3d at 763. *See AOSI* v. *USAID*, 570 F. Supp. 2d 533, 548 (S.D.N.Y. 2008) ("[T]he D.C. Circuit was not aware of the restrictions placed on recipients,

such that compliance with the Guidelines is not as straightforward as the simple organization of a subsidiary, which normally does not entail the separations imposed by the Guidelines.").

In contrast, the Second Circuit's decision was based on the actual Guidelines, which make clear that, contrary to *DKT*'s assumption, the Policy Requirement's restrictions apply to entire grantees, and any qualifying affiliate would have to be a wholly separate entity—not merely a separate program within a grantee organization. (This Court made clear in *Rust* that this is a constitutionally significant distinction. 500 U.S. at 196-197.) These were not the facts or circumstances presented to the D.C. Circuit, which considered whether a funding condition is constitutional when it restricts *federally funded programs* (which hypothetically could be loosely separated from privately funded programs). The Second Circuit, however, considered whether the same funding condition is constitutional when it binds entire grantees, *including their privately funded programs, speech, and activities* (which must be strictly separated from affiliated entities). Arriving at different answers to these different questions does not create a circuit conflict.

Second, the *DKT* court accepted the government's assertion—made many years ago—that, without the Policy Requirement, "[t]he effectiveness of the government's viewpoint-based [Leadership Act] program would be substantially undermined, and the government's message confused." 477 F.3d at 762-763 (internal quotation marks omitted). Yet the preliminary injunction entered by the district court in this case has now been in place six years and the government has presented no evidence that Leadership Act programs have been "undermined" or that the government's mes-

sage has been "confused." The Second Circuit did not base its assessment of the government's justification of the Policy Requirement on the hypothetical risk of harm that the government presented to the D.C. Circuit. Rather, the Second Circuit assessed the constitutionality of the Policy Requirement based on the record before it, which was devoid of evidence of harm to Leadership Act programs during the six-year period in which the injunction has been in place.

2. The government also asserts a broader division between the Second Circuit's holding and other circuits that "have found that affiliation guidelines cure any constitutional difficulty, because they allow funding recipients to cabin the effects of a restriction on speech to the scope of the federally funded program." Pet. 27. This argument fails for two reasons.

First, the Guidelines here do not "cabin" the Policy Requirement's effects to the scope of federally funded programs. If an organization receives Leadership Act funds, that entire organization must explicitly adopt and espouse as its own an anti-prostitution policy, and all of the organization's speech and activities, whether federally or privately funded, are subject to the Policy Requirement. *See infra* Statement.A. Similarly, the entire organization is prohibited from doing or saying anything the government deems to be inconsistent with its policy. The Guidelines do nothing to "cabin" these effects to the scope of federal funds or even federally funded programs; rather, the Policy Requirement continues to apply wholesale to the recipient organization. The Guidelines merely allow the recipient organization to affiliate with a separate organization that would not be subject to the requirement. (Of course, affiliation with a separate organization does nothing to address the compelled speech and viewpoint discrimination vis-

ited on the funding recipient.) This is not the same as cases where restrictions have applied only to a single federally funded program within a recipient organization, but not to the other programs within the organization. *See Rust*, 500 U.S. at 196. The Guidelines accordingly do not have the same ameliorating effect as guidelines have had in the cases the government cites.

Second, the government cites no case where another circuit has held that affiliation guidelines permit the government to compel privately funded speech as a condition of receiving federal funds. The government's cited cases stand only for the proposition that, when the government tells an organization *not* to say or do something through the federally funded program, the First Amendment may be satisfied by provisions that allow the affected organization to say or do that thing through another program or subsidiary (providing that the *programs* are sufficiently separate). *See Planned Parenthood, Inc.* v. *Dempsey*, 167 F.3d 458 (8th Cir. 1999); *Legal Aid Soc'y of Hawaii* v. *Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998). The Second Circuit properly distinguished this scenario. The Policy Requirement compels recipient organizations to adopt and espouse as their own the government's anti-prostitution policy; allowing those organizations to create an affiliate that is not bound by the Policy Requirement in no way remedies that compulsion. Pet. App. 35a-36a.[5]

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[5] In any event, this Court has recently held that allowing an affiliate to speak is no panacea for a restriction on an organization's First Amendment rights. *See Citizens United* v. *FEC*, 130 S. Ct. 876, 897 (2010).

II. THE SECOND CIRCUIT'S DECISION IS CORRECT

1. In resolving this case, the Second Circuit correctly applied this Court's precedents. The Court has repeatedly stated that Congress may not condition the receipt of public funds on the relinquishment of First Amendment rights.[6] Yet, that is exactly what the Policy Requirement does.

The Second Circuit correctly concluded that the Policy Requirement compels speech, is viewpoint discriminatory, and prohibits any speech or activities that the government deems to be "inconsistent" with the government's viewpoint, making it likely to violate the First Amendment on multiple grounds. The mere fact that these First Amendment violations stem from an exercise of Congress's spending power does not save the Policy Requirement. *See, e.g.*, Pet. App. 18a ("Congress' Spending power, while broad, is not unlimited, and other constitutional provisions may provide an independent bar to the conditional grant of federal funds."). Congress cannot do with the spending power what it is expressly prohibited from doing with the leg-

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[6] *See, e.g., Rumsfeld* v. *Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006) ("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit" (quoting *United States* v. *American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003))); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) ("[T]his Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.").

islative power. *See Rumsfeld* v. *Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006) ("*FAIR*").

2. As a preliminary matter, the Second Circuit correctly determined that the Policy Requirement should be subjected to heightened scrutiny. Pet. App. 29a. This level of scrutiny applies because the Policy Requirement compels speech and is viewpoint discriminatory, and thus raises the most serious First Amendment concerns. Pet. App. 26a-27a.

This Court has traditionally applied heightened scrutiny when reviewing laws that threaten core First Amendment freedoms. *See, e.g., Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 526-527 (1977) ("Statutes that trench on fundamental liberties ... are not entitled to the same presumption of constitutionality we normally accord legislation" but rather "must be subjected to the most searching kind of judicial scrutiny"). Paramount among those core freedoms is the right to choose whether to speak, and when speaking, what to say. *See, e.g., Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977) (First Amendment protection "includes both the right to speak freely and the right to refrain from speaking at all"). For that reason, laws compelling speech have long been subject to heightened scrutiny. *See, e.g., Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) ("We have long recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest" and therefore "have required that the subordinating interests of the State must survive exacting scrutiny."); *Knox* v. *SEIU, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not ... compel the endorsement of ideas that it approves" and if it does, such regulations "are subject to exacting First Amendment scrutiny").

The same is true of viewpoint discriminatory schemes. *See, e.g., Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 66 (1983) ("In light of the fact that viewpoint discrimination implicates core First Amendment values, the ... policy can be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." (internal quotation marks omitted)); *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 118 (1991) (holding government regulations that "impose content-based burdens on speech" must be "necessary to serve a compelling state interest and [ ] narrowly drawn to achieve that end" (internal quotation marks omitted)).

Thus, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), this Court applied heightened scrutiny to invalidate a regulation barring editorializing by television stations that receive federal funds, *id.* at 380, 402, even though that spending power regulation neither compelled speech nor discriminated based on viewpoint. *Id.* at 371 n.7. At least as stringent a standard is warranted here, where the Policy Requirement is far more offensive to Respondents' First Amendment rights. *See also Rust*, 500 U.S. at 195 n.4 (applying heightened scrutiny to a funding condition that applied only to federally funded programs and that did not compel speech). Moreover, the government has identified no case—and Respondents know of none—where this Court has applied anything less than heightened scrutiny to any funding condition analogous to the Policy Requirement.

3. The Second Circuit's determination that the Policy Requirement likely fails heightened scrutiny is also correct, for at least three reasons.

a. First, by compelling speech and discriminating based on viewpoint, the Policy Requirement violates a long line of First Amendment authority in this Court. The Second Circuit was right to recognize that the First Amendment generally does not permit the government to compel speech. "If there is any fixed star in our constitutional constellation, it is that no official ... can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]" *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Indeed, "[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *FAIR*, 547 U.S. at 61.

This Court has found affirmative compulsion of speech to be more troubling than an affirmative compulsion of silence, which itself can violate the First Amendment. *Barnette*, 319 U.S. at 633 ("[I]nvoluntary affirmation could be commanded only on even more immediate and urgent grounds than silence."); *Wooley*, 430 U.S. at 715 (1977) (finding that "[c]ompelling [an] affirmative act ... involved a more serious infringement upon personal liberties than" compelling a "passive act").[7] The government cites no case, and Respondents are not aware of any, where this Court has upheld a funding condition that affirmatively compelled grantees to take an organization-wide pledge by adopting and

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[7] Contrary to the government's contention that the Second Circuit improperly relied on these cases (Pet. 21) the Second Circuit quite appropriately drew from these cases and others "the underlying principle that the First Amendment does not look fondly on attempts by the government," such as the Policy Requirement, "to affirmatively require speech" (Pet. App. 26a n.3. (Second Circuit panel opinion)).

espousing as their own the government's policy viewpoint.

The Second Circuit also correctly recognized that the Policy Requirement discriminates based on viewpoint, a trait that separately "offend[]s the First Amendment." Pet. App. 27a (citing *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Simon & Schuster*, 502 U.S. at 116); *see also Simon & Schuster*, 502 U.S. at 118 (viewpoint-based restrictions "raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace" and thus "[t]he First Amendment presumptively places this sort of discrimination beyond the power of the government").

Indeed, when this Court has upheld challenged Spending Clause enactments, it has emphasized the absence of compelled speech and viewpoint discrimination. In upholding the funding condition in *Rust*, for example, the Court relied on the fact that "nothing in [the regulation] requires a doctor to represent as his own any opinion that he does not in fact hold." 500 U.S. at 200. Similarly, in *FAIR*, the Court explained that the Solomon Amendment did not run afoul of the unconstitutional conditions doctrine because the law "does not dictate the content of the speech at all.... There is nothing in this case approaching a Government-mandated pledge or motto that the [grantee] must endorse." 547 U.S. at 62.[8]

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[8] All four dissenting Justices in *League of Women Voters* made clear that, in their view, the government's scheme there passed constitutional muster because—unlike the Policy Requirement—it did *not* involve viewpoint discrimination. 468 U.S. at 407 (Rehnquist, C.J., dissenting) ("Congress' prohibition is strictly

b. Second, the Policy Requirement compels a grantee, as a condition of federal funding, to conform even its private speech and activities to the government's viewpoint. The Policy Requirement thus falls well outside the limits this Court has set to ensure that funding conditions do not violate First Amendment rights.

The Policy Requirement forces grantees in their entirety to adopt and espouse as their own the government's anti-prostitution policy, and it prohibits them from saying or doing anything "inconsistent" with that policy, even when spending their own private funds. Yet, in *Rust*, on which the government heavily relies in its petition, this Court went to great pains to explain that the regulatory scheme at issue was constitutional because it required grantees to give up abortion-related speech *only* within the government-funded program or project. 500 U.S. at 196 (holding that a federal funding requirement did not "condition the receipt of a benefit ... on the relinquishment of a constitutional right" because "[t]itle X expressly distinguishes between a Title X *grantee* and a Title X *project*."). Additionally, the condition in *Rust* permitted abortion-related speech by grantees, so long as such speech was undertaken only in the context of the grantees' privately funded programs. *Id.* at 199 n.5 ("recipient[s] remain free to use private, non-Title X funds to finance abortion-related activities"). Unlike the Policy Require-

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neutral. In no sense can it be said that Congress has prohibited only editorial views of one particular ideological bent."); *id.* at 413 (Stevens, J., dissenting) ("[O]f greatest significance for me, the statutory restriction is completely neutral in its operation—it prohibits all editorials without any distinction being drawn concerning ... the point of view that might be expressed.").

ment, the conditions in *Rust* "govern[ed] [only] the scope of the Title X *project's* activities, and [left] the grantee unfettered in its other activities." *Id.* at 198-199.

The government has said that the separation requirements imposed here were "modeled on" the separation requirements in *Rust*. Pet. 28 & n.7. But *Rust* did not involve compelled speech and the separation requirements there were designed to maintain adequate separation among *programs* within a grantee organization, 500 U.S. at 199 n.5, as opposed to the separation requirements here which are designed to maintain adequate separation among independent *entities or affiliates*. *See* 45 C.F.R. § 89.3. The Guidelines, therefore, are not analogous to the regulations in *Rust*; nor do they cure the fatal constitutional defects arising from the compelled speech and viewpoint discrimination aspects of the Policy Requirement.

Rust explicitly observed that the cases in which the Court had held program conditions unconstitutional were situations precisely like this one, "in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." 500 U.S. at 197; *see also* Pet. 28 (admitting that "the relevant question" in assessing a funding condition "is whether the condition 'effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally

funded program.'" (quoting *Rust*, 500 U.S. at 197) (alteration in original)).[9]

As a result of the entity-wide restriction, the Policy Requirement undeniably extends to, and dictates, speech and activities undertaken with a grantee's wholly private funds. This Court has made clear that speech restrictions on the use of purely private funds are likely to violate the First Amendment. *See, e.g., League of Women Voters*, 468 U.S. at 400 (holding unconstitutional a condition preventing publicly funded television stations from editorializing largely because the ban applied equally to private funds and, therefore, the "station is not able to segregate its activities according to the source of its funding" and "[t]he station has no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity"); *see also Rust*, 500 U.S. at 200 (holding regulations constitutional because they were "limited to Title X funds; [and] the recipient remains free to use private, non-Title X funds to finance abortion-related activities").

c. Third, the Policy Requirement violates the First Amendment by precluding grantees from engaging in speech or activities the government deems to be "inconsistent with" the government's viewpoint. This abridgement of free speech rights on its own constitutes an independent violation of the First Amendment:

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[9] Tellingly, OLC relied on the Policy Requirement's imposition of "organization-wide restrictions" in its original opinion that the Policy Requirement is unconstitutional and cannot be applied to U.S.-based grantees. *See supra* Statement.D.

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.... Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622, 641 (1994); *see also First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-785 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue ... [The] power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (footnote omitted)); *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

Indeed, in *Legal Services Corp.* v. *Velazquez*, this Court found a First Amendment violation where a condition on federal funding, like the Policy Requirement,

suppressed private speech contrary to the government's viewpoint on an issue related to the relevant government program. 531 U.S. 533, 548-549 (2001) ("*Velazquez II*") ("Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.").

4. The government argues that the Second Circuit erred principally because it should have reviewed and upheld the Policy Requirement as "government speech." But, as the Second Circuit properly recognized, this case does not fit within the government speech doctrine. Pet. App. 18a (citing *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). In any case, the government speech doctrine at most excuses viewpoint discrimination *only* with respect to *federally funded speech*—it does not permit the government to control the content of *privately funded speech*, much less to *compel* such private speech.

a. The government speech doctrine does not apply because the Policy Requirement does not purport to be a means to convey a message *on the government's behalf*; rather, it purports only to compel private speakers to adopt and espouse *as their own* the government's viewpoint.

This Court has recognized that "viewpoint-based funding decisions can be sustained in ... instances, like *Rust*, in which the government use[s] private speakers to transmit information *pertaining to its own program*." *Velazquez II*, 531 U.S. at 541 (internal quotation marks and citation omitted; emphasis added); *see also Rosenberger*, 515 U.S. at 833 ("[In *Rust*], the government did not create a program to encourage private

speech but instead used private speakers to transmit specific in-formation pertaining to its own program.").

Here, the government is not disbursing public funds to private entities to "convey a governmental message." Rather, the government requires that Leadership Act grantees convey information pertaining to their *own* beliefs. The Policy Requirement mandates that each organization adopt and espouse, as its own, an opposition to prostitution. This Court has never excused such compulsion under the "government speech" doctrine.

b. Further, contrary to the government's claim, the Leadership Act is not an anti-prostitution messaging statute. Rather, that characterization of the statute was first espoused by the government's lawyers in this liti-gation. Such tactics contravene this Court's admonition that the government "cannot recast a condition on fund-ing as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez II*, 531 U.S. at 547.

In any event, the government's attempted recasting of the Leadership Act is belied by the legislative history, statutory text, and practice. When the President pro-posed the legislation, when Congress debated it, and again when the President signed it, the Leadership Act was conceived of as an effort to fight the spread of HIV/AIDS through treatment, care, and prevention—not through anti-prostitution messaging.[10]

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[10] *See e.g.*, State of the Union Address, 149 Cong. Rec. H212, H213 (daily ed. Jan. 28, 2003) ("This comprehensive plan will prevent 7 million new AIDS infections, treat at least 2 million people with life-extending drugs, and provide humane care for millions of people suffering from AIDS and for children orphaned by AIDS.");

To achieve its purpose of "strengthen[ing] and enhanc[ing]" the United States response to the HIV/AIDS pandemic, 22 U.S.C. § 7603, the Leadership Act outlines a comprehensive strategy of actions, including:

- treatment initiatives that include improving healthcare delivery systems and medicine distribution, as well as placing U.S. healthcare professionals in areas of need, *see, e.g.*, 22 U.S.C. §§ 7631(a), (c), 7634(a), (b), (e), 7672;
- efforts to improve care for people affected by HIV/AIDS, including strengthening palliative care programs for debilitated patients, and bolstering support services for HIV-positive parents, their children, and orphans, *see, e.g.*, 22 U.S.C. §§ 7631(a), 7654, 7655; and
- prevention efforts that include undertaking vaccine research, reducing mother-to-child transmission, and encouraging a wide range of behavioral changes such as condom usage and testing, *see, e.g.*, 22 U.S.C. §§ 7611(a)(4), (8), 7631(a), 7652(a).

Taken together, the statutory purpose and this panoply of strategies (and others) make clear that the Leader-

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Remarks by the President on the Signing of H.R. 1298, the Leadership Act, 2003 U.S.C.C.A.N. 726, 729 (Mar. 27, 2003) (same); 149 Cong. Rec. S6415 (daily ed. May 15, 2003) (statement of Sen. Lugar) ("This plan would provide $15 billion over the next 5 years for AIDS care, treatment and prevention[.]"); 149 Cong. Rec. E1084 (daily ed. May 21, 2003) (statement of Rep. Schakowsky) ("This important legislation integrates prevention, care, and treatment.").

ship Act was designed to combat HIV/AIDS through a broad and comprehensive set of actions—not words.

The government cites only 22 U.S.C. §§ 7601(23) and 7611(a)(12)—two of literally hundreds of provisions in the law—for its proposition that the statute is an anti-prostitution messaging statute. Those provisions cannot bear the weight the government places on them. Section 7601(23) says only that the "sex industry" is an "ad-ditional cause[] of and factor[] in the spread of the HIV/AIDS epidemic." Section 7611(a)(12), for its part, says that the President shall "make the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts by," among other things, promoting abstinence, encouraging condom use, and promoting education and counseling. These provisions fall well short of establishing an anti-prostitution messaging campaign. Indeed, as the Second Circuit pointed out, the government's claim that anti-prostitution policy statements are "integral" to the Leadership Act's goals is "undermined by the fact that the government has chosen to fund high-profile, global organizations"—the WHO, the United Nations, the Global Fund to Fight AIDS, Tuberculosis and Malaria, and the International AIDS Vaccine Initiative—"that remain free to express openly a contrary policy, or no policy at all." Pet. App. 33a-34a.

In fact, the only express "messaging" component in the statute—added in the 2008 amendment—is unrelated to the anti-prostitution policy and directed at the U.S. Government, namely the Global AIDS Coordinator. *See* 22 U.S.C. § 7611(h).

c. In any event, even if this were a "government speech" case, the Policy Requirement fails to satisfy even that doctrine's more deferential review. As the

Second Circuit correctly recognized, "[t]he Policy Requirement goes well beyond the funding condition upheld in *Rust* because it compels [Respondents] to voice the government's viewpoint and to do so as if it were their own." Pet. App. 31a. Such a condition is not found in any of the "government speech" cases the government cites. Indeed, critical to this Court's upholding the funding condition at issue in *Rust* was that (1) grantees' employees were not required to represent as their own any opinion that they did not in fact hold; (2) grantees' employees were free to make clear that advice regarding abortion was beyond the scope of the federally funded program; and (3) grantees remained free to use private funds to finance abortion-related activities. *Rust*, 500 U.S. at 199 n.5, 200. In stark contrast, the Policy Requirement negates all three of those mitigating factors.

Further, as the Second Circuit properly held, "by compelling [Respondents] to affirmatively pledge their opposition to prostitution" (Pet. App. 32a), the government has stepped beyond any "legitimate and appropriate steps [needed] to ensure that its message is neither garbled nor distorted by [Respondents]." *Rosenberger*, 515 U.S. at 833. Even assuming that the Leadership Act contains a government message—which it does not—despite ample opportunity, the government has never introduced a single piece of evidence that its "message" has been harmed in any way by the district court's pre-liminary injunction, which has been in place for the last six years. This dearth of evidence shows the Policy Re-quirement is not, in fact, an "appropriate step[] [needed] to ensure that [the government's] message is neither garbled nor distorted." *Id.*

III. The Government's Additional Arguments Lack Merit

1. The government contends that "[t]he Second Circuit has [] exercised 'the grave power of annulling an Act of Congress,'" and has thereby "undermined the government's ability to implement the comprehensive approach chosen by Congress." Pet. 12. These claims are overblown. The Second Circuit did not annul an entire statute; nor did it strike down a substantial part of a statute. Instead, it preliminarily enjoined enforcement of a marginal provision of a lengthy statute that otherwise remains intact.

Moreover, as noted, the government has not offered any evidence that any federal program or message has been adversely affected by its inability to enforce the Policy Requirement during the last six years, whether against Respondents or against any of the organizations that Congress expressly exempted from the Policy Requirement.[11] Meanwhile, while the injunction has been in place, the government has touted the success of the Leadership Act,[12] and Respondents have continued to save lives, fight the spread of HIV/AIDS, teach best practices, provide public health services, and otherwise help the government fulfill the Act's goals.

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[11] Given the interlocutory nature of this appeal, if the government thinks it can make out a factual case of harm it would be free to do so on remand.

[12] *See, e.g.*, U.S. Dep't of State, *PEPFAR Blueprint* 2-3 (2012), *available at* http://www.pepfar.gov/documents/organization/201386.pdf.

To the extent the government is genuinely concerned that private organizations dedicated to the fight against HIV/AIDS will somehow undermine the government's anti-prostitution policy, the Leadership Act contains other safeguards to address those concerns. For example, a separate provision of the Leadership Act already prohibits grantees from spending government money on the promotion of prostitution. *See supra* Statement A n.2. Moreover, HHS and USAID impose a host of other conditions on government funds, which are designed to ensure that grantees act in furtherance of the policy objectives embodied in the Leadership Act.[13] There is accordingly no risk that denying review and leaving the preliminary injunction in place would somehow enable grantees to use federal funds to promote prostitution or to otherwise undermine the government's putative anti-prostitution policy.

2. Review is further unwarranted because this case is at an interlocutory stage and there has been no final decision on the merits. As the government has routinely argued, "[t]his Court 'generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction.'" *See, e.g.*, U.S. BIO, *Legal Servs. for N.Y. City* v. *Legal Servs. Corp.* (No. 06-1308), at 7 (alterations in original) (quoting *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari)). Indeed, "[t]he interlocutory nature of the or-

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[13] *See, e.g.*, CAJA 444-446, 468-469 (cooperative agreement provisions giving agencies rights to inspect, monitor, and approve work plans, evaluation plans, and materials recipients prepare in order to ensure compliance with requirement that Leadership Act funds not be used to promote or advocate the legalization or practice of prostitution).

der 'alone furnishe[s] sufficient ground for the denial of the application.'" *Id.* (alterations in original) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). There is no reason to depart from that principle here.

3. Finally, review is particularly inappropriate because even if this Court were to grant and reverse on the First Amendment issue, the Policy Requirement would still be vulnerable to a vagueness challenge. Although the district court and the Second Circuit did not reach the issue, the requirement that grantees refrain from using their private funds in a manner that is "inconsistent" with a policy opposing prostitution fails to "provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). The government has repeatedly refused to provide any further guidance on what speech or conduct the government deems as "inconsistent" with a policy opposing prostitution, leaving plaintiffs to guess at its meaning and risk significant civil liability and criminal penalties. *See* AOSI CA Br. 56 & n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

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DECEMBER 2012

Constitutionally Permissible Funding Restrictions for Sex Trafficking and HIV/AIDS Prevention

OLC has considered the constitutional implications of the following funding restrictions in the Trafficking Victims Protection Reauthorization Act (TVPRA), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (USLAHATMA), and the Consolidated Appropriations Act:

> (1) restrictions on the use of program funds, which require (with a minor difference between TVPRA and USLAHATMA) that program funds not be used to promote, support, or advocate the legalization or practice of prostitution, *see* 22 U.S.C. § 7110(g)(l) (as added by TVPRA § 7(7)); USLAHATMA § 301(e);
>
> (2) organization-wide restrictions, which would require an organization receiving funds either to refrain from promoting prostitution or its legalization, *see* 22 U.S.C. § 7110(g)(2) (as added by TVPRA § 7(7)), or to have a policy explicitly opposing prostitution and sex trafficking, *see* USLAHATMA § 301(t); and
>
> (3) a restriction on what may be said when an organization wants to provide information about the use of condoms as part of a project or activity funded by the Consolidated Appropriations Act, *see* Pub. L. No. 108-199, Div. D, Title II (2004).

In the limited time available to us, we have not been able to conduct a comprehensive analysis, but we have reached the following tentative views, which might need to be altered after further analysis:

- [REDACTED]*
- With regard to category (2), the organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs—
  - cannot be constitutionally applied to U.S. organizations, whether they are recipients or subrecipients, and whether they are operating inside or outside the United States;
  - can be constitutionally applied to foreign organizations whether they are recipients or subrecipients, but only when they are engaged in activities overseas. The government could exercise its foreign-affairs and plenary immigration powers to exclude from the United States a foreign organization that advocates certain views. The government could also argue, albeit with considerable litigation risk, that it could deport a foreign organization that advocates certain views. But powers to exclude or deport are separate from grant funding, and an organization's advocacy in the United States cannot justify termination of or failure to renew a grant.
- [REDACTED]

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* A simple definition of a foreign organization is contained in the Mexico City Policy: an organization "that is not organized under the laws of any State of the United States, the District of Columbia, or the Commonwealth of Puerto Rico." *Restoration of the Mexico City Policy*, 66 Fed. Reg. 17303, 17303 (2001). The Mexico City Policy has withstood First Amendment challenges (though not every question has been fully litigated). Our constitutional advice here essentially mirrors the limits of the Mexico City Policy with regard to [REDACTED] category (2).

No. 12-10

In the Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Over a three-judge dissent from the denial of rehearing en banc, the Second Circuit enjoined on constitutional grounds an important provision in an Act of Congress. That provision places a condition on the receipt of federal aid aimed at reducing the spread of HIV/AIDS: recipients must "have a policy explicitly opposing prostitution and sex trafficking," 22 U.S.C. 7631(f), to ensure that the government's message opposing those activities is communicated by its private partners wherever in the world federal funds are spent. Respondents do not deny that because they represent most of the domestic groups receiving the HIV/AIDS funding at issue, the decision below effectively enjoins the operation of Section 7631(f) with respect to organizations based in the United States. At a minimum, then, respect

for Congress warrants this Court's plenary review, even in the absence of a conflict. In fact, however, the Second Circuit's decision creates a square circuit conflict and currently merits this Court's attention, as every judge to consider the question at the rehearing stage below recognized.

A. The Court Of Appeals Invalidated A Significant Provision Of An Act Of Congress And Of An Important Federal Program

1. As the government has explained (Pet. 12-22), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 22 U.S.C. 7601 *et seq.*, directs the President to establish a comprehensive international strategy to fight the transmission of HIV/AIDS, with "the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." 22 U.S.C. 7611(a)(12) (Supp. V 2011). Congress thus directed that all prevention efforts funded under the Act should aim at reducing or eliminating the underlying causes of HIV/AIDS, including prostitution and sex trafficking. Section 7631(f) is central to that task: it ensures that if respondents wish to receive funds under the Act, they "must communicate the message the government chooses to fund." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 764 (D.C. Cir. 2007) (*DKT*). If the government were required to engage as partners organizations that are neutral toward or that even affirmatively disagree with efforts to oppose prostitution and sex trafficking, the government's message opposing those activities could be "garbled" or "distorted" by the activities of federal funding recipients. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

Respondents agree (Br. in Opp. 27-29) that Congress opted in the Leadership Act for a comprehensive strategy to combat the global spread of HIV/AIDS. They simply believe that Section 7631(f) is a "*marginal* provision" of the Act, which in their view is really "designed to combat HIV/AIDS through a broad and comprehensive set of actions—not words." *Id.* at 29, 31 (emphasis added). The panel majority believed the same thing and rejected the government's contention "that advocating against prostitution [and sex trafficking] is indeed 'central' to the Leadership Act Program." Pet. App. 33a. But as the government has explained (Pet. 18-19), it is for *Congress*—not respondents or the lower courts—to decide when a condition on the receipt of federal funds is integral to the funding program at issue. Here, Congress determined in enacting the Leadership Act that the reduction of prostitution and sex trafficking is important in preventing the global spread of HIV/AIDS. Respondents obviously disagree with that legislative judgment, but they cannot blue-pencil an Act of Congress and then ask this Court to look the other way.

2. Respondents emphasize (Br. in Opp. 32-33) that the case is interlocutory, because the injunction here is preliminary rather than final. The interlocutory status of a case can, of course, counsel against granting review, but that consideration applies with far less force when a lower court's constitutional ruling prevents the government from implementing or enforcing an Act of Congress. See, *e.g.*, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 55-56 (2006) (reviewing in interlocutory posture whether the Solomon Amendment violated the First Amendment); *Cutter* v. *Wilkinson*, 544 U.S. 709, 717-718 (2005) (reviewing in interlocutory posture whether a federal statute violated

the Establishment Clause). Moreover, further proceedings here could not bear on the constitutional question, because the panel majority's reasoning was that Section 7631(f) violates the First Amendment. See Pet. 29-30. Notably, respondents do not contend otherwise. They do not claim that remanding the case could even potentially affect the panel majority's determination of unconstitutionality.

Respondents propose that on remand the government could "make out a factual case of harm." Br. in Opp. 31 n.11; see *id.* at 14-15, 31. It is hard to know what purpose that evidentiary presentation would serve. The panel majority "conclude[d] that [Section] 7631(f), as implemented by the Agencies, falls well beyond what the Supreme Court and [the Second Circuit] have upheld as permissible conditions on the receipt of government funds." Pet. App. 3a. Respondents offer no basis for believing that this conclusion would be altered by any evidentiary showing. Simply put, respondents point to nothing meaningful that could happen on remand.

3. Respondents do not dispute (Br. in Opp. 5-6 & n.4) that they represent most of the groups based in the United States that receive the HIV/AIDS funding at issue. As a result, the decision below effectively enjoins the operation of Section 7631(f) with respect to domestic organizations. That wholesale invalidation of a provision of federal law in itself warrants this Court's review. See, *e.g.*, *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 492 (2009) (reviewing a nationwide preliminary injunction that prevented agency from enforcing regulations). Moreover, delaying review while the lower courts convert the preliminary injunction into a permanent one would only exacerbate the government's injury: private entities would continue to receive billions of dollars in

federal aid while ignoring a condition that Congress attached to that funding. For six years, respondents have been able to accept federal funds and yet advance views that are inconsistent with or even directly contrary to Congress's comprehensive strategy against HIV/AIDS. The government should not have to wait any longer to validate an Act of Congress.[1]

B. The Decision Below Creates A Square Circuit Conflict

1. As the government has explained (Pet. 22-25), the panel majority's approach in this case squarely conflicts with the District of Columbia Circuit's decision in *DKT*. In both this case and *DKT*, the courts of appeals considered virtually identical First Amendment challenges to Section 7631(f) brought by domestic funding recipients. In this case, the Second Circuit upheld that challenge because the statute "compels grantees to espouse the

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[1] Respondents briefly contend that review is unwarranted because "even if this Court were to grant and reverse on the First Amendment issue, the Policy Requirement would still be vulnerable to a vagueness challenge." Br. in Opp. 33. Neither of the courts below addressed respondents' vagueness challenge, see Pet. App. 36a n.8, 214a-215a, 250a, and respondents do not point to any other court that has done so. Respondents cannot stave off review of the panel majority's novel First Amendment holding (and its resulting facial invalidation of an important provision of an Act of Congress) by pointing to their equally novel vagueness challenge. Indeed, respondents do not even claim that the statute itself is vague. Section 7631(f) requires respondents to "have a policy explicitly opposing prostitution and sex trafficking," and they have not pointed to any lack of clarity in that requirement. Rather, they challenge the HHS and USAID affiliation guidelines, which allow funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). See, *e.g.*, 45 C.F.R. 89.3. But even assuming the agencies' regulations were unconstitutionally vague, that would not provide any basis for the panel majority's decision invalidating the statute.

government's position on a controversial issue." Pet. App. 36a. In *DKT*, the District of Columbia Circuit rejected the challenge because the statute "does not compel [grantees] to advocate the government's position on prostitution and sex trafficking; it requires only that if [a grantee] wishes to receive funds it must communicate the message the government chooses to fund." 477 F.3d at 764. There is no way to reconcile those directly contrary conclusions.

Unlike respondents, the panel majority did not even try. It cited the District of Columbia Circuit's decision in *DKT* but made no attempt to distinguish it. Pet. App. 31a. At the rehearing stage, every judge to address the question agreed that the panel decision and *DKT* are flatly inconsistent. See *id.* at 108a (Pooler, J., concurring in the denial of rehearing en banc) (noting that the panel decision "created a circuit split"); *id.* at 103a (Cabranes, J., dissenting from the denial of rehearing en banc) ("[T]he panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge to the Leadership Act by another grantee that refused to adopt a policy opposing prostitution."). Indeed, the district court held here that "DKT International * * * is barred from seeking relief in this action because its application is prohibited by the principles of res judicata," as a result of having lost its nearly identical First Amendment challenge in *DKT*. *Id.* at 250a-251a. Respondents are therefore alone in asserting that the two decisions—one allowing, and the other enjoining, Section 7631(f)'s enforcement—are consistent.

2. Respondents incorrectly argue (Br. in Opp. 12-15) that *DKT* is distinguishable because it rested on two mistaken factual assumptions—one about the agencies'

affiliation guidelines and another about the harms to the government from failing to enforce Section 7631(f).

a. The court in *DKT* explained at length why Section 7631(f)'s funding condition is not importantly different from similar conditions that this Court has upheld in cases like *Rust* v. *Sullivan*, 500 U.S. 173 (1991). See *DKT*, 477 F.3d at 761-762. The plaintiff-organization in *DKT* argued, however—just as respondents do here (Br. in Opp. 22-23)—that *Rust* "involved funding restrictions only on *projects*, not on *grantees*." *DKT*, 477 F.3d at 763. The court in *DKT* squarely rejected that distinction. The court reasoned that just as a clinic in *Rust* could advocate abortion "through programs that [were] separate and independent from the project that receives Title X funds," *ibid.* (quoting *Rust*, 500 U.S. at 196), so too here a funding recipient could "set[] up a subsidiary organization that certifies it has a policy opposing prostitution," *ibid.* The court in *DKT* correctly recognized that the constitutionality of Section 7631(f) does not depend on whether respondents have to divert federal funds into separate projects or separate affiliated entities. See *Velazquez* v. *Legal Services Corp.*, 164 F.3d 757, 766-767 (2d Cir. 1999) (upholding funding restrictions on grantees rather than projects).

Respondents incorrectly assert (Br. in Opp. 13) that it is more difficult to establish an affiliated entity than the court in *DKT* envisioned. In fact, the agencies' guidelines are *more* favorable to respondents than the *DKT* court foresaw. The court in *DKT* assumed that a funding recipient would have to form a separate subsidiary organization. See 477 F.3d at 763 & n.4. In April 2010, however, the agencies modified their affiliation guidelines so that legal separation between an organization and its affiliate would no longer be required but

would be only one factor in determining an affiliate's independence. See Pet. App. 10a-11a. In any event, the disagreement between the Second and the District of Columbia Circuits has nothing to do with the level of *practical* difficulty in forming an affiliate. Rather, those courts disagree over whether, assuming there is no barrier to forming an affiliate, that resolves any *constitutional* difficulty. See *id.* at 35a (reasoning that the affiliation guidelines do not remedy "compelled-speech type problems" because "whether the recipient is a parent or an affiliate, it is required to affirmatively speak the government's viewpoint on prostitution").

b. In respondents' view (Br. in Opp. 14-15), the court in *DKT* uncritically accepted the government's assertion that Section 7631(f) is a necessary component of the Leadership Act. According to respondents, "the preliminary injunction * * * in this case has now been in place six years and the government has presented no evidence that Leadership Act programs have been 'undermined' or that the government's message has been 'confused.'" *Ibid.* Again, respondents' argument has nothing to do with the disagreement between the courts of appeals. Congress decided that its goals in the Leadership Act would be undermined if two conflicting viewpoints could be advanced by the same federal funding recipient: a message opposing prostitution and sex trafficking with their federal funds and a contrary message with their private funds. The Second Circuit has held that the First Amendment bars Congress from making that legislative judgment; the District of Columbia Circuit has held that it does not. That significant constitutional question merits this Court's review.

C. The Decision Below Is Incorrect

1. Respondents argue at length (Br. in Opp. 17-30) that the decision below is correct. Needless to say, those arguments could and should be fully addressed in the parties' merits briefs. At a general level, however, respondents' arguments ignore that Section 7631(f) is a condition on the receipt of federal funds rather than a direct regulation of speech. For instance, respondents argue (*id.* at 18-19) that Section 7631(f) is subject to heightened scrutiny, citing this Court's cases on compelled speech and viewpoint-discrimination. Those cases, however, did not involve Congress's spending power. As the District of Columbia Circuit has recognized, that distinction is critical. "Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message" by denying them access to an "already-existing public benefit." *DKT*, 477 F.3d at 762 n.2.

Indeed, this Court previously has held that a viewpoint-based funding condition is subject to heightened scrutiny only when it is "aimed at the suppression of dangerous ideas." *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958) (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950)); see *Regan* v. *Taxation With Representation*, 461 U.S. 540, 548 (1983) ("The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas.") (internal quotation marks and brackets omitted). Respondents do not cite, let alone discuss, those cases. Nor have they argued, and the panel majority did not conclude, that Section 7631(f)'s policy requirement is aimed at suppressing

dangerous ideas. As Judge Straub explained in dissent, "[t]here is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy Requirement was to suppress pro-prostitution views," and "[t]he Policy Requirement and Guidelines therefore in no way silence government criticism or contrary views on prostitution and HIV/AIDS." Pet. App. 83a-84a.

2. Respondents contend that "affirmative compulsion of speech [is] more troubling than an affirmative compulsion of silence." Br. in Opp. 20. But as the government has explained (Pet. 16), this Court has rejected that affirmative-negative distinction as without constitutional significance in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). Respondents neither address *Riley* nor offer any reason why the distinction should assume constitutional significance in the context of funding conditions. Respondents cite *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), but in those cases this Court simply held that citizens could not be compelled to speak when they wished to remain silent. The Court did not hold that silencing those who wish to speak is a less serious matter under the First Amendment. See Pet. App. 99a (Cabranes, J., dissenting from the denial of rehearing en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions.").

3. Finally, respondents emphasize (Br. in Opp. 22-24) that Section 7631(f) imposes an entity-wide restriction and thus prevents an affiliate from spending even private funds to espouse prostitution or sex trafficking. But respondents do not dispute that they can

form affiliates whose sole purpose is receiving and administering federal HIV/AIDS funding. It is no answer, then, to say that even if Section 7631(f) does not infringe respondents' speech rights (because they may form affiliates and otherwise continue operating as they do now), it infringes their *affiliates'* speech rights. If an affiliate does not want to serve as a vehicle for the receipt and administration of federal funds, it does not have to do so. It may simply decline to accept federal HIV/AIDS funding. See, *e.g.*, *Rust*, 500 U.S. at 199 n.5 ("[T]o avoid the force of the regulations, [the recipient[] can simply decline the subsidy."). The agencies' guidelines, however, allow respondents to form special-purpose affiliates and thereby cabin the effects of Section 7631(f) to the scope of the federally funded programs at issue.[2]

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[2] HHS and USAID previously have modified their guidelines to provide funding recipients with additional flexibility in partnering with affiliates not subject to Section 7631(f). See pp. 7-8, *supra*; Pet. 8-9. This Office has been informed that HHS and USAID are considering revisions to their guidelines that would allow funding recipients different methods for demonstrating compliance with the statutory requirement (*i.e.*, demonstrating that they have a policy explicitly opposing prostitution and sex trafficking). Those revisions, however, would not affect the need for this Court's review of the decision below, because the court of appeals held that the policy requirement itself violates the First Amendment (by compelling funding recipients to speak), without regard to how funding recipients show that they have complied with Section 7631(f).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2012

Supreme Court, U.S.
FILED
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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JULY 2, 2012
CERTIORARI GRANTED: JAN. 11, 2013

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-4917-cv

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL, INTERACTION, PLAINTIFFS-APPELLEES

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
10/6/08	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL , Copy of notice of appeal and district court docket entries on behalf of APPELLANT United States Agency for Inter–national Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, filed. [Entry date Oct 8 2008] [LR]
10/6/08	Copy of district court order dated 8/7/08 RECEIVED. [Entry date Oct 8 2008] [LR]

DATE	PROCEEDINGS
10/6/08	Index in lieu of Record on Appeals Electronically Filed (Original documents remain in the originating court). [Entry date Oct 8 2008] [LR]
10/7/08	1 St. supplemental index in lieu of supplemental record filed. [Entry date Oct 8 2008] [LR]
10/16/08	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, Form C filed, with proof of service. [Entry date Oct 20 2008] [LR]
10/16/08	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, Form D filed, with proof of service. [Entry date Oct 20 2008] [LR]
10/20/08	Letter from Atty. Rebekah Diller on behalf of Plaintiffs-Appellees Alliance for Open Society Internationals, Inc, et.al., stating, "After supplementary letter briefing regarding the new guidelines, the panel issued a Summary Order dated Nov. 8, 2007 that the preliminary injunction in place and remanded the case to the District Court for further proceedings. The Summary Order provided that upon restoration of jurisdiction to the Second Circuit, the matter would be returned to the same panel.", received [Entry date Oct 27 2008] [LR]

DATE	PROCEEDINGS
10/20/08	Notice of appeal acknowledgment letter from Rebekah Diller received. [Entry date Oct 27 2008] [LR]
10/24/08	Pre-Argument Conference Notice and Order from Vidya Kurella, Scheduled For: Friday November 14, 2008 @ 11:30 am, Filed. [Entry date Oct 27 2008] [LR]
10/24/08	Scheduling order # 1 filed. Appellants brief due 12/5/2008. Appellees brief due 1/5/2009. Ready week 3/2/2009. [Entry date Oct 27 2008] [LR]
10/29/08	The new case manager assigned to this case is: Munoz, Elizabeth. [Entry date Oct 29 2008] [EM]
10/29/08	Notice to all parties of the change in case manager. [Entry date Oct 29 2008] [EM]
12/5/08	Appellant United States Agency for International Development, Appellant Julie Gerberding, Appellant Michael Leavitt, et al motion extended time to file briefs filed with proof of service. [Entry date Dec 8 2008] [EM]
12/12/08	Notice to all parties of the order filed. [Entry date Dec 12 2008] [EM]

DATE	PROCEEDINGS
12/12/08	Order FILED GRANTING motion extended time by Appellant Michael Leavitt, Appellant United States Agency for International Development, Appellant Julie Gerberding, Appellant United States Department of Health and Human Services, Appellant United States Centers of Disease Control and Prevention, Appellant Henrietta Fore, endorsed on motion dated 12/5/2008 Extended Appellants brief due is 1/30/2009. Extended Appellees brief due is 3/2/2009. Extended Ready week is 4/13/2009. [Entry date Dec 12 2008] [EM]
1/15/09	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, brief FILED with proof of service. [Entry date Jan 19 2009] [EM]
1/15/09	Volume 1 for APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, 2 volume joint appendix filed. w/pfs. [Entry date Jan 19 2009] [EM]

DATE	PROCEEDINGS
1/15/09	Volume 2 of APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, 2 volume joint appendix filed w/pfs. [Entry date Jan 19 2009] [EM]
1/15/09	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, special appendix filed(w/pfs) [Entry date Jan 19 2009] [EM]
2/17/09	Appellee Alliance for Open Society International, Inc., Appellee Open Society Institute, Appellee Pathfinder International, et al motion extended time to file briefs filed with proof of service. [Entry date Feb 18 2009] [EM]
2/26/09	Notice to all parties of the order filed. [Entry date Feb 26 2009] [EM]

DATE	PROCEEDINGS
2/26/09	Order FILED GRANTING motion extended time by Appellee Open Society Institute, Appellee Alliance for Open Society International, Inc., Appellee Pathfinder International, Appellee Global Health Council, endorsed on motion dated 2/17/2009, it is hereby ordered that the motion for an extension of time to file Appellee's brief to 5/4/09 is granted. The appeal shall be heard no earlier than the week of 6/22/09 filed. (RKW, C.J.J.) (JP) [Entry date Feb 26 2009] [EM]
4/7/09	Appellee Alliance for Open Society International, Inc., Appellee Open Society Institute, Appellee Pathfinder International, et al motion extended time filed with proof of service. [Entry date Apr 8 2009] [EM]
4/17/09	Notice to all parties of the order filed. [Entry date Apr 17 2009] [EM]
4/17/09	Order FILED GRANTING motion extended time by Appellee Open Society Institute, Appellee Alliance for Open Society International, Inc., Appellee Pathfinder International, Appellee Global Health Council, endorsed on motion dated 4/7/2009, it is hereby ordered that th emotion for an extesnio of time is granted: The Appellee's brief shall be filed on or before 7/7/09; no further extensions. The Appeal shall be heard no earlier than the week of 8/24/09 filed. (RKW, C.J.J.) (JP) NO FURTHER EXTENSIONS. [Entry date Apr 17 2009] [EM]

DATE	PROCEEDINGS
7/8/09	Stipulation to withdraw appeal without prejudice to reinstatement RECEIVED. [Entry date Jul 8 2009] [EM]
7/14/09	Order withdrawing appeal by consent without prejudice to reinstatement stating that the appeal is hereby withdrawn without costs and without attorneys' fees and without prejudice, subject to reactivation of the appeal by appellant's counsel by written notice to the Clerk of this Court by 7/14/09. If not thus timely reactivated, the appeal shall be subject to dismissal. Withdrawal of the appeal from active consideration shall not operate as a dismissal of the appeal under FRAP 42(b) filed. (VK) [Entry date Jul 14 2009] [EM]
7/14/09	Notice to all parties of the Stipulation So Ordered. [Entry date Jul 14 2009] [EM]
7/14/09	Stipulation to withdraw appeal without prejudice to reinstatement RECEIVED. [Entry date Jul 15 2009] [EM]
7/14/09	Letter received from Mr. Torrance, counsel for Appellees, advising the Court of the Stipulation without prejudice being filed, and explaining why additional time is needed by the parties to fully review the policies at issue, and for the agencies to comply with the Administrative Procedure Act and other requirements in revising the relevant regulations and guidance publiccations. [Entry date Jul 16 2009] [EM]

DATE	PROCEEDINGS
7/14/09	Letter received from B. Torrance, counsel for appellee, requesting to have appeal reactivated as per previously filed stipulation. [Entry date Jul 17 2009] [EM]
7/24/09	Order withdrawing appeal by consent without prejudice to reinstatement, the appeal is hereby withdrawn without costs and without attorney's fees and without prejudice, subject to reactivation of the appeal by appellant's counsel by written notice to the Clerk of this Court by 1/8/10. If not thus timely reactivated the appea shall be subject to dismissal FILED. (VK) [Entry date Jul 24 2009] [EM]
7/24/09	Notice to all parties of the Stipulation So Ordered. [Entry date Sep 24 2009] [EM]
9/24/09	Certified copy of the so ordered, stipulation filed 07/24/09 issued to the district court, [informational only]. [Entry date Spt 24 2009] [EM]
1/7/10	Letter received from Appellant Counsel Benjamin Torrance, requesting that the appeal be reinstated in accordance with the terms of the stipulation filed 7/14/09. [Entry date Jan 11 2010] [EM]
1/11/10	Notice of Reinstatement dated 01/11/10 on behalf of appellant/petitioner Alliance for Open Society International, FILED. Reinstatement Code: P. [Entry date Jan 11 2010] [EM]

DATE	PROCEEDINGS
1/11/10	Notice to all parties of the order filed. [Entry date Jan 11 2010] [EM]
1/11/10	Certified copy of the order, filed 1/11/09 issued to the district court, [informational only]. [Entry date Jan 11 2010] [EM]
1/14/10	AMENDED Notice of Reinstatement dated 01/11/2010 on behalf of Defendants-Appellants, FILED. Reinstatement Code: P. [Entry date Jan 14 2010] [EM]
1/14/10	Notice to all parties of the amended order filed. [Entry date Jan 14 2010] [EM]
1/14/10	Certified copy of the amended order, filed 01/14/2010 issued to the district court, [informational only]. [Entry date Jan 14 2010] [EM]
1/19/10	The new case manager assigned to this case is: Ralls, Timothy. [Entry date Jan 19 2010] [DM]
1/19/10	Certified copy of reinstatement order receipt returned from the district court. [Entry date Jan 19 2010] [TR]
1/19/10	Certified copy of amended reinstatement order receipt returned from the district court. [Entry date Jan 19 2010] [TR]

DATE	PROCEEDINGS
1/25/10	SCHEDULING NOTIFICATION dated 01/25/10, on behalf of APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, informing court of proposed brief due date, RECEIVED. [Entry date Jan 26 2010] [TR]
1/25/10	Letter received from Plaintiff-Appellee giving notice of non-opposition to Defendants request for new briefing. [Entry date Jan 26 2010] [TR]
2/4/10	Appellant United States Agency for International Development, Appellant Julie Gerberding, Appellant Michael Leavitt, et al motion to file supplemental brief filed with proof of service. [Entry date Feb 5 2010] [AS]
2/9/10	Notice to counsel re Motion Order, filed 2/9/2010 [Entry date Feb 9 2010] [AS]
2/9/10	Order FILED GRANTING motion to file supplemental brief by Appellant Michael Leavitt. "IT IS HEREBY ORDERED that the motion by Appellants for leave to file a new brief on or before May 11, 2010, in light of pending regulatory action, is GRANTED". Before GEL, CJ. By JP, MSA. [Entry date Feb 9 2010] [AS]

DATE	PROCEEDINGS
5/11/10	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, supplemental brief FILED with proof of service. [Entry date May 17 2010] [TR]
5/11/10	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, supplemental special appendix filed (w/pfs) [Entry date May 17 2010] [TR]
5/20/10	SCHEDULING NOTIFICATION dated 05/20/2010, on behalf of APPELLEE Alliance for Open Society International, Inc., Global Health Council, Open Society Institute, Pathfinder International, informing court of proposed brief due date, RECEIVED. [Entry date May 21 2010] [TR]
5/24/10	SO ORDERED SCHEDULING NOTIFICATION dated 05/24/2010 setting APPELLEE Alliance for Open Society International, Inc., Global Health Council, Open Society Institute, Pathfinder International, brief due date: 09/08/2010, FILED. [Entry date May 24 2010] [TR]

DATE	PROCEEDINGS
9/9/10	APPELLEE Alliance for Open Society International, Inc., Global Health Council, Open Society Institute, Pathfinder International, brief filed with proof of service. [Entry date Sep 10 2010] [AJ]
9/16/10	AMICUS CURIAE American Humanist Association, brief filed with proof of service. [Entry date Sep 17 2010] [AJ]
9/16/10	NOTICE OF APPEARANCE FORM from Lenora Lapidus, on behalf of AMICUS CURIAE American Humanist Association, FILED. (Orig in acco, copy to Admissions Dept.). [Entry date Sep 17 2010] [AJ]
9/20/10	NOTICE OF APPEARANCE FORM from Lawrence Lustberg, on behalf of AMICUS CURIAE Independent Sector, FILED. (Orig in acco, copy to Admissions Dept.). [Entry date Sep 22 2010] [AJ]
9/20/10	AMICUS CURIAE Independent Sector, brief filed with proof of service. [Entry date Sep 22 2010] [AJ]
9/21/10	LOCAL RULE 34 ACKNOWLEDGEMENT, dated 09/16/2010, requesting oral argument, on behalf of Appellees Alliance for Open Society International, et al, RECEIVED. [Entry date Sep 21 2010] [AV]

DATE	PROCEEDINGS
9/27/10	APPELLANT United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, ET AL, reply brief filed with proof of service. [Entry date Sep 29 2010] [AJ]
10/6/10	LOCAL RULE 34 ACKNOWLEDGEMENT, dated 09/27/2010, requesting oral argument, on behalf of APPELLANT United States Agency for International Development, ET AL, RECEIVED. [Entry date Oct 6 2010] [CA]
10/26/10	CASE CALENDARING, 12/09/2010, 9:00am, SET. [Entry date Oct 26 2010] [CA]
10/26/10	Calendar argument notice mailed to attorneys/parties. [Entry date Oct 26 2010] [AG]
12/9/10	Case heard before panel: STRAUB, POOLER, PARKER, C.JJ. [Entry date Dec 9 2010] [AG]
12/9/10	Benjamin Torrance receipt for fee for oral argument cd received. [Entry date Dec 10 2010] [AG]
12/10/10	Oral argument cd mailed to Benjamin Torrance. [Entry date Dec 10 2010] [AG]
12/17/10	Cindy Custodio receipt for fee for oral argument cd received. [Entry date Dec 17 2010] [AG]
12/17/10	Oral argument cd mailed to Cindy Custodio. [Entry date Dec 17 2010] [AG]

DATE	PROCEEDINGS
1/28/11	Letter received from Cindy Custodio—US Document Retrieval Service Inc. requesting CD of the Oral Argument. Fee Paid. Forwarded to Calendar Team. Receipt # 211452. [Entry date Jan 28 2011] [SH]
1/28/11	Cindy Custodio receipt for fee for oral argument cd received. [Entry date Feb 1 2011] [AG]
2/1/11	Oral argument cd mailed to Cindy Custodio. [Entry date Feb 1 2011] [AG]
7/6/11	OPINION, district court judgment is affirmed, FILED. (CJS, RSP, BDP) [Entry date Jul 6 2011] [CM]
7/6/11	Judge Straub dissents in a separate opinion, filed. [Entry date Jul 6 2011] [CM]
7/6/11	Notice to all parties of Opinion dated 07/06/2011. [Entry date Jul 6 2011] [CM]
7/6/11	The new case manager assigned to this case is: Mazariego, Connie. [Entry date Jul 6 2011] [CM]
7/6/11	Judgment filed. [Entry date Jul 7 2011] [CM]
7/25/11	Errata sheet re: filed. [Entry date Jul 25 2011] [CM]
8/19/11	MOTION, for extension of time to file petition for rehearing, on behalf of Appellant United States Agency for International Development, Appellant Julie Gerberding, Appellant Michael Leavitt FILED. [Entry date Aug 19 2011] [CM]

DATE	PROCEEDINGS
8/25/11	ORDER, granting a motion for extension of time until September 06, 2011 to file a petition for rehearing by RSP FILED [Entry date Aug 25 2011] [AS]
9/6/11	PETITION FOR REHEARING EN BANC, on behalf of Appellant United States Agency for International Development, Appellant Julie Gerberding, Appellant Michael Leavitt, et al FILED. [Entry date Sep 12 2011] [CM]
9/13/11	ORDER, dated 09/13/2011, plaintiffs-appellees are directed to file a response to the Petition for Rehearing En Banc filed by defendant-appellant on September 6, 2011. The response must be filed on or before October 13, 2011 and must not exceed 15 pages, FILED. Before: (CJS, RSP, BDP) [Entry date Sep 13 2011] [CM]
9/13/11	Notice to all parties of Order dated 09/13/2011. [Entry date Sep 13 2011] [CM]
10/13/11	OPPOSITION PAPERS, to petition for rehearing en banc, on behalf of Appellees Alliance for Open Society International Inc. et. al. FILED. [Entry date Oct 14 2011] [CM]
11/30/11	LETTER, dated 11/30/2011, on behalf of Rebekah Diller, RECEIVED. [Entry date Nov 30 2011] [CM]
11/30/11	Request for address change for Rebekah Diller c/o Benjamin N. Cardozo School of Law, Yeshiva University, 55 Fifth Avenue, 10th Floor, New York, NY 10003. [Entry date Nov 30 2011] [CM]

DATE	PROCEEDINGS
2/2/12	PETITION OPINION, rehearing en banc is denied, by DJ FILED. [Entry date Feb 2 2012] [CM]
2/2/12	Judge Cabranes, Raggi and Livingston dissents from the denial of rehearing en banc, FILED. [Entry date Feb 2 2012] [CM]
2/2/12	Judge Pooler concurs in the denial of rehearing en banc, FILED. [Entry date Feb 2 2012] [CM]
2/2/12	Notice to all parties of Opinion dated 02/02/2012. [Entry date Feb 2 2012] [CM]
2/2/12	ORDER, denying petition for rehearing en banc on behalf of Appellant Michael Leavitt, Appellant United States Agency for International Development, Appellant Julie Gerberding, Appellant United States Department of Health and Human Services, Appellant United States Centers of Disease Control and Prevention, Appellant Henrietta Fore, FILED. [Entry date Feb 2 2012] [CM]
2/17/12	Judgment MANDATE ISSUED. CLOSED [Entry date Feb 17 2012] [CM]
2/17/12	Notice to all parties of Mandate dated 02/17/2012, [Entry date Feb 17 2012] [CM]
2/21/12	Gloria Pinto receipt for fee for oral argument cd received. [Entry date Apr 9 2012] [AG]
3/1/12	Oral argument cd mailed to Gloria Pinto. [Entry date Apr 9 2012] [AG]

DATE	PROCEEDINGS
4/26/12	EXTENSION OF TIME TO FILE A WRIT OF CERTIORARI on behalf of Appellant United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Henrietta Fore, et al is granted, RECEIVED. [Entry date May 3 2012] [CM]
6/28/12	ERRATA SHEET, for Opinion dated 02/02/2012, by JAC FILED. [Entry date Jun 28 2012] [CM]
7/10/12	U.S SUPREME COURT NOTICE of writ of certiorari filing dated 07/03/2012, U.S. Supreme court docket #12-10, RECEIVED. [Entry date Jul 10 2012] [CM]
1/15/13	Writ of Certiorari GRANTED [Entry date Jan 15 2013] [CM]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(FOLEY SQUARE)

Docket No. 1:05-cv-08209-VM

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC, ET AL.

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/23/05	1	COMPLAINT against United States Agency for International Development, Andrew Natsios. (Filing Fee $ 250.00, Receipt Number 556437) Document filed by Alliance for Open Society International, Inc., Open Society Institute. (lb,) Additional attachment(s) added on 9/29/2005 (kco,). (Entered: 09/28/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
9/23/05		SUMMONS ISSUED as to United States Agency for International Development, Andrew Natsios, U.S. Attorney and U.S. Attorney General. (lb,) (Entered: 09/28/2005)
9/23/05		Magistrate Judge Debra C. Freeman is so designated. (lb,) (Entered: 09/28/2005)
9/23/05	2	RULE 7.1 DISCLOSURE STATEMENT. Document filed by Alliance for Open Society International, Inc.. (lb,) Additional attachment(s) added on 9/29/2005 (kco,). (Entered: 09/28/2005)
9/23/05		Case Designated ECF. (lb,) (Entered: 09/28/2005)
9/27/05		Minute Entry for proceedings held before Judge Victor Marrero: Telephone Conference held on 9/27/2005. Court held telephone conf. to address whether this case should be consoldiated with similar case pending in District of Columbia. Plaintiff's request for extension of page limitation for brief in supprot of preliminary injunction motion granted. Gov't to inform Court of anticipated response within one week of receipt of preliminary injunction motion. (pl,) (Entered: 10/06/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
9/28/05	3	MOTION for Preliminary Injunction. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Attachments: # 1 Declaration of Burt Neuborne # 2 Declaration of Rossana Barbero # 3 Declaration of Chris Beyrer (Part 1 of 3) # 4 Declaration of Chris Beyrer (Part 2 of 3) # 5 Declaration of Chris Beyrer (Part 3 of 3) # 6 Declaration of Pedro Chequer # 7 Declaration of Rebekah Diller (Part 1 of 4) # 8 Declaration of Rebekah Diller (Part 2 of 4) # 9 Declaration of Rebekah Diller (Part 3 of 4) # 10 Declaration of Rebekah Diller (Part 4 of 4) # 11 Declaration of Robert Kushen # 12 Declaration of Ruth W. Messinger # 13 Declaration of Maurice I. Middleberg # 14 Declaration of Aryeh Neier # 15 Certificate of Service) (Diller, Rebekah) (Entered: 09/28/2005)
9/28/05	4	MEMORANDUM OF LAW in Support re: 3 MOTION for Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Attachments: # 1 Certificate of Ser-

DATE	DOCKET NUMBER	PROCEEDINGS
		vice) (Diller, Rebekah) (Entered: 09/28/2005)
9/29/05		***NOTE TO ATTORNEY TO E-MAIL PDF. Note to Attorney David Stuart Udell for noncompliance with Section (3) of the S.D.N.Y. 3rd Amended Instructions For Filing An Electronic Case or Appeal and Section 1 (d) of the S.D.N.Y. Procedures For Electronic Case Filing. E-MAIL the PDF for Document 1 Complaint, 2 Rule 7.1 Disclosure Statement to: case_openings@nysd.uscourts.gov. (lb,) (Entered: 09/29/2005)
9/30/05	5	SUMMONS RETURNED EXECUTED Summons and Complaint, served. United States Agency for International Development served on 9/23/2005, answer due 10/13/2005; Andrew Natsios served on 9/23/2005, answer due 10/13/2005. Service was accepted by Daniel Green. Document filed by Alliance for Open Society International, Inc.; Open Society Institute. (Diller, Rebekah) (Entered: 09/30/2005)
10/3/05	6	FILING ERROR - WRONG DOCUMENT TYPE SELECTED FROM MENU - MOTION for Pre-

DATE	DOCKET NUMBER	PROCEEDINGS
		liminary Injunction (Amended Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction). Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Diller, Rebekah) Modified on 10/6/2005 (kg). (Entered: 10/03/2005)
10/6/05		***NOTE TO ATTORNEY TO RE-FILE DOCUMENT - DOCUMENT TYPE ERROR. Note to Attorney Rebekah Diller to RE-FILE Document 6 MOTION for Preliminary Injunction *Amended Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.*. Use the document type Memorandum of Law in Support of Motion found under the document list Responses and Replies. (kg,) (Entered: 10/06/2005)
10/11/05	7	AMENDED MEMORANDUM OF LAW in Support re: 3 MOTION for Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Diller, Rebekah) (Entered: 10/11/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
10/12/05	8	MOTION for Temporary Restraining Order. Document filed by Alliance for Open Society International, Inc., Open Society Institute. (Attachments: # 1 Affidavit Declaration of Rebekah Diller # 2 Exhibit Exhibit A to Diller Declaration # 3 Exhibit Exhibit B to Diller Declaration # 4 Exhibit Exhibit C to Diller Declaration # 5 Text of Proposed Order Order to Show Cause with Temporary Restraining Order) (Diller, Rebekah) (Entered: 10/12/2005)
10/14/05	9	STIPULATION AND ORDER that during the pendency of plntfs' motions for perliminary injunction and a TRO, AOSI will in good faith not take any action that they think violates the US Leadership against HIV et al. (Signed by Judge Victor Marrero on 10/13/05) (cd,) (Entered: 10/14/2005)
10/18/05	10	TRANSCRIPT of proceedings held on 10/7/2005 before Judge Victor Marrero. (jar,) (Entered: 10/18/2005)
10/20/05	11	ENDORSED LETTER addressed to Judge Victor Marrero from Richard E. Rosberger dated 10/19/05 re: The briefing schedule set forth in

DATE	DOCKET NUMBER	PROCEEDINGS
		said letter with respect to plaintiffs motion for a temporary restraining order is approved. Defendants response served by 11/21/05, reply served by 12/9/05. (Signed by Judge Victor Marrero on 10/19/05) (db,) (Entered: 10/20/2005)
11/9/05	12	Amicus Curiae APPEARANCE entered by Christine Ingrid Magdo on behalf of AIDS Action et al.. (Magdo, Christine) (Entered: 11/09/2005)
11/9/05	13	RESPONSE in Support re: 3 MOTION for Preliminary Injunction. *Memorandum of Law of AIDS Action and 21 Other Organizations as Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction.* Document filed by AIDS Action et al.. (Magdo, Christine) (Entered: 11/09/2005)
11/9/05	14	CERTIFICATE OF SERVICE of Notice of Appearance, Memorandum of Law served on Alliance for Open Society International, Inc., Open Society Institute, United States Agency for International Development, Andrew S. Natsios on November 9, 2005. Service was made by Mail (Federal Express). Document filed by AIDS Action et

DATE	DOCKET NUMBER	PROCEEDINGS
		al.. (Magdo, Christine) (Entered: 11/09/2005)
11/9/05	15	NOTICE of Appearance by Claudia Maria Flores on behalf of AIDS Action et al. (Flores, Claudia) (Entered: 11/09/2005)
11/9/05	16	NOTICE of Appearance by Claudia Maria Flores on behalf of AIDS Action et al. (Flores, Claudia) (Entered: 11/09/2005)
11/9/05	17	NOTICE of Appearance by Claudia Maria Flores on behalf of AIDS Action et al. (Flores, Claudia) (Entered: 11/09/2005)
11/10/05	18	ENDORSED LETTER addressed to Judge Victor Marrero from Christine I. Magdo dated 11/9/05 re: Request granted. Amici Curiae herein are granted leave to file Memorandum of Law in support of plaintiffs' motion for preliminary injunction.. (Signed by Judge Victor Marrero on 11/10/05) (sac,) (Entered: 11/14/2005)
12/5/05	20	AMENDED COMPLAINT amending 1 Complaint, against Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and

DATE	DOCKET NUMBER	PROCEEDINGS
		Human Services, United States Agency for International Development, Andrew Natsios. Document filed by Pathfinder International, Alliance for Open Society International, Inc., Open Society Institute. Related document: 1 Complaint, filed by Open Society Institute, Alliance for Open Society International, Inc.. (sac,) (Entered: 12/08/2005)
12/5/05		SUMMONS ISSUED as to United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (sac,) (Entered: 12/08/2005)
12/5/05		Set Answer Due Date purs. to 20 Amended Complaint,, as to United States Agency for International Development answer due on 12/19/2005; Andrew Natsios answer due on 12/19/2005; Julie Louise Gerberding answer due on 1/3/2006; Michael O. Leavitt answer due on 1/3/2006; United States Centers of Disease Control and Prevention answer due on 1/3/2006; United States

DATE	DOCKET NUMBER	PROCEEDINGS
		Department of Health and Human Services answer due on 1/3/2006. (sac,) (Entered: 12/08/2005)
12/5/05	21	RULE 7.1 DISCLOSURE STATEMENT. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (sac,) (Entered: 12/08/2005)
12/6/05	19	ENDORSED LETTER addressed to Judge Victor Marrero from Jane Manning dated 12/5/05 re: counsel requests to file their motion on 12/12/05 and a conference with the court if the court prefers counsel to follow a different procedure. So Ordered. (Signed by Judge Victor Marrero on 12/6/05) (dle,) (Entered: 12/07/2005)
12/6/05		Set/Reset Deadlines: Motions due by 12/12/2005. (dle,) (Entered: 12/07/2005)
12/8/05	22	MOTION for Preliminary Injunction. Document filed by Pathfinder International. (Attachments: # 1 Affidavit Declaration of Daniel Pellegrom) (Diller, Rebekah) (Entered: 12/08/2005)
12/8/05	23	MEMORANDUM OF LAW in Support re: 22 MOTION for Prelimi-

DATE	DOCKET NUMBER	PROCEEDINGS
		nary Injunction.. Document filed by Pathfinder International. (Diller, Rebekah) (Entered: 12/08/2005)
12/9/05	24	Amicus Curiae APPEARANCE entered by Jessica Neuwirth on behalf of Apne Aap et.al [Amicus]. (Neuwirth, Jessica) (Entered: 12/09/2005)
12/13/05		Minute Entry for proceedings held before Judge Victor Marrero: Telephone Conference held on 12/13/2005. Counsel for plaintiff and goverment dft's in light of addition of new discuss possible adjustment to filing deadline (pl,) (Entered: 01/10/2006)
12/16/05	25	SUMMONS RETURNED EXECUTED Summons and Amended Complaint,, served. United States Agency for International Development served on 12/5/2005, answer due 2/3/2006; Andrew Natsios served on 12/5/2005, answer due 2/3/2006; Julie Louise Gerberding served on 12/6/2005, answer due 2/6/2006; Michael O. Leavitt served on 12/6/2005, answer due 2/6/2006; United States Centers of Disease Control and Prevention served on 12/6/2005, answer due 2/6/2006;

DATE	DOCKET NUMBER	PROCEEDINGS
		United States Department of Health and Human Services served on 12/6/2005, answer due 2/6/2006. Service was made by MAIL. Document filed by Alliance for Open Society International, Inc.; Pathfinder International; Open Society Institute. (Diller, Rebekah) (Entered: 12/16/2005)
1/3/06	26	ENDORSED LETTER addressed to Judge Victor Marrero from Richard E. Rosberger dated 1/3/06 re: request granted; the briefing schedule with regard to the motion for preliminary injunction herein is extended as set forth in this order. (Signed by Judge Victor Marrero on 1/3/06) (pl,) (Entered: 01/04/2006)
1/4/06	27	MEMORANDUM OF LAW in Opposition re: 22 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order., 3 MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and

DATE	DOCKET NUMBER	PROCEEDINGS
		Human Services. (Rosberger, Richard) (Entered: 01/04/2006)
1/4/06	28	DECLARATION of Richard E. Rosberger in Opposition re: 22 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order., 3 MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E) (Rosberger, Richard) (Entered: 01/04/2006)
1/4/06	29	DECLARATION of Richard E. Rosberger in Opposition re: 22 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order., 3 MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and

DATE	DOCKET NUMBER	PROCEEDINGS
		Prevention, United States Department of Health and Human Services. (Attachments: # 1 Exhibit A# 2 Exhibit C) (Rosberger, Richard) (Entered: 01/04/2006)
1/4/06	30	ENDORSED LETTER addressed to Judge Victor Marrero from Richard E. Rosberger dated 1/3/2006 re: to Defendants request permission to file an opposition brief with a page length of up to 55 pages, as so that it may properly respond to all of the Plaintiff motions and to the amici briefs. Further, Defendants respectfully request that the date for Defendants submit their answer to the Amended Complaint be extended from January 3, 2006 to January 10, 2006. Plaintiffs have consented to the foregoing requests, and that their reply brief upon their motions be extended from January 24, 2006 to January 25, 2006.., United States Agency for International Development answer due 1/10/2006; Andrew Natsios answer due 1/10/2006; Julie Louise Gerberding answer due 1/10/2006; Michael O. Leavitt answer due 1/10/2006; United States Centers of Disease Control and

DATE	DOCKET NUMBER	PROCEEDINGS
		Prevention answer due 1/10/2006; United States Department of Health and Human Services answer due 1/10/2006. Replies due by 1/25/2006. Responses due by 1/4/2006. ENDORSEMENT: Request GRANTED. The briefing schedule with regard to the motion for preliminary injunction herein is extended as set forth herein motion papers submitted by response 1/4/2006; reply 1/25/2006. Defendants' brief may contain up to 55 pages. Defendants' time ro answer the amended complaint is extended to 1/10/2006. So Ordered. (Signed by Judge Victor Marrero on 1/3/2006) (jmi,) (Entered: 01/05/2006)
1/5/06	31	DECLARATION of Richard E. Rosberger in Opposition re: 22 MOTION for Preliminary Injunction., 6 MOTION for Preliminary Injunction *Amended Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.*, 3 MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie

DATE	DOCKET NUMBER	PROCEEDINGS
		Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 # 5 Exhibit E) (Rosberger, Richard) (Entered: 01/05/2006)
1/6/06	32	MEMORANDUM OF LAW in Opposition re: 22 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order., 3 MOTION for Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Rosberger, Richard) (Entered: 01/06/2006)
1/12/06	34	ENDORSED LETTER addressed to Judge Victor Marrero from Michael J. Garcia dated 1/10/06 re: Counsel writes to request that the date for defendants to answer the amended complaint be extended to 1/13/06. Request Granted. The

DATE	DOCKET NUMBER	PROCEEDINGS
		time for defendant(s) to answer or otherwise move with respect to the complaint in this action is extended to 1/13/06. So Ordered. (Signed by Judge Victor Marrero on 1/12/06) (jco,) (Entered: 01/18/2006)
1/17/06	33	STIPULATION AND ORDER during the pendency of plaintiff Pathfinder's motion for a preliminary injunction, Pathfinder will in good faith not take any action that it thinks violates the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, 22 U.S.C. 7631(f)(the "Act"),etc. as further set forth in this Order. So Ordered. (Signed by Judge Victor Marrero on 1/12/06) (jco,) (Entered: 01/18/2006)
1/17/06		Set Answer Due Date purs. to 34 Endorsed Letter, as to United States Agency for International Development answer due on 1/13/2006; Andrew Natsios answer due on 1/13/2006; Julie Louise Gerberding answer due on 1/13/2006; Michael O. Leavitt answer due on 1/13/2006; United States Centers of Disease Control and Prevention answer due on 1/13/2006; United States Depart-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment of Health and Human Services answer due on 1/13/2006. (jco,) (Entered: 01/18/2006)
1/19/06	35	ANSWER to Amended Complaint. Document filed by Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt. (Rosberger, Richard) (Entered: 01/19/2006)
1/19/06	36	Amicus Curiae APPEARANCE entered by Lawrence S. Lustberg on behalf of InterAction. (Attachments: # 1 Memorandum of Law of Proposed Amicus Curiae Interaction in Support of Plaintiffs Motion for a Preliminary Injunction) (Lustberg, Lawrence) (Entered: 01/19/2006)
1/25/06	37	ENDORSED LETTER addressed to Judge Victor Marrero from Rebekah Diller dated 1/24/06 re: a request to file a reply brief not exceeding 43 pages in length. ENDORSEMENT: Request GRANTED. Plaintiff's reply brief herein may exceed to Court's page limitation up to a total of 43 pages as set forth above (Signed by Judge Victor Marrero on 1/24/06) (kco,) (Entered: 01/25/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
1/25/06	38	NOTICE OF APPEARANCE by David William Bowker on behalf of Pathfinder International, Open Society Institute (Bowker, David) (Entered: 01/25/2006)
1/25/06	39	NOTICE OF APPEARANCE by David William Bowker on behalf of Alliance for Open Society International, Inc. (Bowker, David) (Entered: 01/25/2006)
1/25/06	40	REPLY MEMORANDUM OF LAW in Support re: 22 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order., 3 MOTION for Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 01/25/2006)
1/25/06	41	DECLARATION of Rebekah Diller in Support re: 22 MOTION for Preliminary Injunction., 3 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit Exhibit 1 # 2 Exhibit Exhibit 2 # 3

DATE	DOCKET NUMBER	PROCEEDINGS
		Exhibit Exhibit 3 # 4 Exhibit Exhibit 4 # 5 Exhibit Exhibit 5 # 6 Exhibit Exhibit 6) (Diller, Rebekah) (Entered: 01/25/2006)
1/25/06	42	DECLARATION of Robert Kushen in Support re: 22 MOTION for Preliminary Injunction., 3 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit Exhibit 1) (Diller, Rebekah) (Entered: 01/25/2006)
1/25/06	43	DECLARATION of Daniel E. Pellegrom in Support re: 22 MOTION for Preliminary Injunction., 3 MOTION for Preliminary Injunction., 8 MOTION for Temporary Restraining Order.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit Exhibit 1 # 2 Exhibit Exhibit 2 # 3 Exhibit Exhibit 3 # 4 # 5 Exhibit Exhibit 5 # 6 Exhibit Exhibit 6 # 7 Exhibit Exhibit 7 # 8 Exhibit Exhibit 8 # 9 Exhibit Exhibit 9 # 10 Exhibit Exhibit 10 # 11

DATE	DOCKET NUMBER	PROCEEDINGS
		Exhibit Exhibit 11 # 12 Exhibit Exhibit 12 # 13 Exhibit Exhibit 13) (Diller, Rebekah) (Entered: 01/26/2006)
1/31/06	44	ENDORSED LETTER addressed to Judge Victor Marrero from Megan Lewis dated 1/30/06 re: Application GRANTED. The 36 Motion of InterAction, to participate in this action as amicus curiae is GRANTED. InterAction is authorized to file a memorandum of law. If the Government elects to respond seperately, it shall propose a briefing schedule. (Signed by Judge Victor Marrero on 1/30/06) (db,) (Entered: 01/31/2006)
2/23/06	45	MOTION for an order, admitting Richard A. Johnston to Appear Pro Hac Vice. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (sac,) (Entered: 02/28/2006)
3/3/06	46	ORDER; granting 45 Motion for Richard A. Johnston to Appear Pro Hac Vice. (Signed by Judge Victor Marrero on 3/2/06) (pl,) (Entered: 03/03/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
3/3/06		Transmission to Attorney Admissions Clerk. Transmitted re: 46 Order on Motion to Appear Pro Hac Vice, to the Attorney Admissions Clerk for updating of Attorney Information. (pl,) (Entered: 03/03/2006)
3/14/06		CASHIERS OFFICE REMARK on 46 Order on Motion to Appear Pro Hac Vice in the amount of $25.00, paid on 3/6/2006, Receipt Number 571893. (jd,) (Entered: 03/14/2006)
4/13/06		Minute Entry for proceedings held before Judge Victor Marrero: Oral Argument held on 4/13/2006 re: 22 MOTION for Preliminary Injunction. filed by Pathfinder International. (pl,) (Entered: 04/21/2006)
4/19/06	47	STIPULATION AND ORDER: It is hereby stipulated and agreed that during the pendency of Pathfinder International's motion for a preliminary injunction, Pathfinder International will in good faith not take any action that it thinks violates the US Leadership Against HIV/AIDS, Tuberculosis, and Malaris Act of 2003, 22 USC 7631(f) CDC Funding Opportunity numbers 04263, 04208, and 04256 and Pathfinder Interna-

DATE	DOCKET NUMBER	PROCEEDINGS
		tional's related representations... (Signed by Judge Victor Marrero on 1/12/2006) (lb,) (Entered: 04/19/2006)
4/26/06	48	TRANSCRIPT of proceedings held on 4/13/2006 @ 9:05 a.m. before Judge Victor Marrero. (lb,) (Entered: 04/26/2006)
5/9/06	49	DECISION AND ORDER that the parties to submit to the Court, with fourteen days of the date of this Order, a proposed preliminary injunction conforming with the determinations in this Decision. So Ordered. (Signed by Judge Victor Marrero on 5/9/2006) (jmi,) (Entered: 05/09/2006)
5/24/06	50	ENDORSED LETTER addressed to Judge Marrero from Richard Rosberger dated 5/23/06: the time for the parties to submit the proposed preliminary injunction hearing is extended to 6/24/06.. (Signed by Judge Victor Marrero on 6/23/06) (cd,) Additional attachment(s) added on 5/25/2006 (cd,). (Entered: 05/25/2006)
6/2/06		Minute Entry for proceedings held before Judge Victor Marrero: Interim Pretrial Conference held on

DATE	DOCKET NUMBER	PROCEEDINGS
		6/2/2006. Counsel for all parties present. Parties to negotioate to try to agree to injunction by 6/9/2006. Plaintiffs to notify Court of status of negotiations. Court to determine injunction if no agreement by 6/9/2006. (jar,) (Entered: 07/17/2006)
6/12/06	51	ENDORSED LETTER addressed to Judge Victor Marrero from Richard E. Rosberger dated 6/9/06. ENDORSEMENT: request GRANTED. The time for the parties to submit a proposed preliminary injunction herein is extended to 6/12/06. (Signed by Judge Victor Marrero on 6/9/06) (js,) (Entered: 06/12/2006)
6/21/06	52	TRANSCRIPT of proceedings held on 6/2/06 before Judge Victor Marrero. (tro,) (Entered: 06/21/2006)
6/29/06	53	PRELIMINARY INJUNCTION ORDER: Pending entry of a final judgment on the merits of the parties' dispute in this action or until any reconsideration or modification of the order is authorized by the court; dfts are enjoined as further set forth in this order. (Signed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Victor Marrero on 6/26/06) (dle,) (Entered: 06/30/2006)
8/7/06	54	ENDORSED LETTER addressed to Judge Victor Marrero from Rebekah Diller dated 8/4/06 re: counsel for plaintiffs request permission to file a motion seeking leave to file a second amended complaint and permission to move for a preliminary injunction. Request granted. A status conference herein is scheduled for 8/11/06 at 1:30 p.m. to address the matter described above by plaintiffs, unless prior thereto the parties stipulate to the amendment of the complaint proposed. So Ordered. (Signed by Judge Victor Marrero on 8/4/06) (dle,) (Entered: 08/08/2006)
8/7/06		Set/Reset Hearings: Status Conference set for 8/11/2006 01:30 PM before Judge Victor Marrero. (dle,) (Entered: 08/08/2006)
8/10/06	55	ENDORSED LETTER addressed to Judge Marrero from Richard E. Rosberger dated 8/9/06 re: Government defendants respond to Plaintiffs' letter, dated August 6, 2006, requesting a pre-motion conference; Request Granted. A status confer-

DATE	DOCKET NUMBER	PROCEEDINGS
		ence herein is scheduled for 8/25/06 at 2:00 p.m. to address the matter described above by defendants.. plaintiffs' prior correspondence in this regard.. (Signed by Judge Victor Marrero on 8/10/06) (djc,) (Entered: 08/10/2006)
8/22/06	56	ENDORSED LETTER addressed to Judge Victor Marrero from Laura K. Abel dated 8/16/2006 re: respectfully requesting a postponement of the status conference for 8/25/2006. ENDORSEMENT: Request Granted. The next status conference herein is rescheduled to 9/6/2006 at 10:00 a.m. So Ordered. (Signed by Judge Victor Marrero on 8/21/2006) (lb,) (Entered: 08/22/2006)
8/25/06	57	NOTICE OF APPEAL from 53 Preliminary Injunction,. Document filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (A.U.S.A.) (nd,) (Entered: 08/29/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
8/29/06		Transmission of Notice of Appeal to the District Judge re: 57 Notice of Appeal,. (nd,) (Entered: 08/29/2006)
8/29/06		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 57 Notice of Appeal,. (nd,) (Entered: 08/29/2006)
8/29/06		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 23 Memorandum of Law in Support of Motion filed by Pathfinder International,, 34 Endorsed Letter,, 12 Amicus Curiae Appearance filed by AIDS Action et al.,, 35 Answer to Amended Complaint filed by Andrew Natsios,, Michael O. Leavitt,, Julie Louise Gerberding,, 5 Summons Returned Executed, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, 18 Endorsed Letter,, 17 Notice of Appearance filed by AIDS Action et al.,, 19 Endorsed Letter,, 22 MOTION for Preliminary Injunction. filed by Pathfinder International,, 14 Certificate of Service Other, filed by AIDS Action et al.,, 3 MOTION

DATE	DOCKET NUMBER	PROCEEDINGS
		for Preliminary Injunction. filed by Open Society Institute,, Alliance for Open Society International, Inc.,, 37 Endorsed Letter,, 26 Endorsed Letter,, 43 Declaration in Support of Motion,, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, Pathfinder International,, 38 Notice of Appearance filed by Open Society Institute,, Pathfinder International,, 47 Stipulation and Order,,, 25 Summons Returned Executed as to USA,, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, Pathfinder International,, 6 MOTION for Preliminary Injunction *Amended Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction.* filed by Open Society Institute,, Alliance for Open Society International, Inc.,, 9 Stipulation and Order,, 46 Order on Motion to Appear Pro Hac Vice, 44 Endorsed Letter,, 33 Stipulation and Order,, 29 Declaration in Opposition to Motion, filed by United States Department of Health and Human Services,, Andrew Natsios,, Michael O. Leavitt,, United States Agency for International Develop-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment,, United States Centers of Disease Control and Prevention,, Julie Louise Gerberding,, 13 Response in Support of Motion, filed by AIDS Action et al.,, 41 Declaration in Support of Motion, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, Pathfinder International,, 27 Memorandum of Law in Oppisition to Motion, filed by United States Department of Health and Human Services,, Andrew Natsios,, Michael O. Leavitt,, United States Agency for International Development,, United States Centers of Disease Control and Prevention,, Julie Louise Gerberding,, 28 Declaration in Opposition to Motion,, filed by United States Department of Health and Human Services,, Andrew Natsios,, Michael O. Leavitt,, United States Agency for International Development,, United States Centers of Disease Control and Prevention,, Julie Louise Gerberding,, 31 Declaration in Opposition to Motion,, filed by United States Department of Health and Human Services,, Andrew Natsios,, Michael O. Leavitt,, United States Agency for International Develop-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment,, United States Centers of Disease Control and Prevention,, Julie Louise Gerberding,, 2 Rule 7.1 Disclosure Statement filed by Alliance for Open Society International, Inc.,, 42 Declaration in Support of Motion, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, Pathfinder International,, 1 Complaint, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, 57 Notice of Appeal, filed by United States Department of Health and Human Services,, United States Agency for International Development,, United States Centers of Disease Control and Prevention,, 8 MOTION for Temporary Restraining Order. filed by Open Society Institute,, Alliance for Open Society International, Inc.,, 32 Memorandum of Law in Oppisition to Motion, filed by United States Department of Health and Human Services,, Andrew Natsios,, Michael O. Leavitt,, United States Agency for International Development,, United States Centers of Disease Control and Prevention,, Julie Louise Gerberding,, 55 Endorsed Letter,, 50 Endorsed

DATE	DOCKET NUMBER	PROCEEDINGS
		Letter,, 53 Preliminary Injunction,, 51 Endorsed Letter,, 40 Reply Memorandum of Law in Support of Motion, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, Pathfinder International,, 15 Notice of Appearance filed by AIDS Action et al.,, 11 Endorsed Letter,, 7 Memorandum of Law in Support of Motion filed by Open Society Institute,, Alliance for Open Society International, Inc.,, 56 Endorsed Letter,, 45 MOTION for Richard A. Johnston to Appear Pro Hac Vice. filed by Open Society Institute,, Alliance for Open Society International, Inc.,, Pathfinder International,, 16 Notice of Appearance filed by AIDS Action et al.,, 20 Amended Complaint,, filed by Open Society Institute,, Alliance for Open Society International, Inc.,, Pathfinder International,, 49 Order,, 24 Amicus Curiae Appearance filed by Apne Aap et.al [Amicus],, 54 Endorsed Letter,,, 4 Memorandum of Law in Support of Motion filed by Open Society Institute,, Alliance for Open Society International, Inc.,, 36 Amicus Curiae Appearance filed by InterAction,, 39 Notice of Appear-

DATE	DOCKET NUMBER	PROCEEDINGS
		ance filed by Alliance for Open Society International, Inc., were transmitted to the U.S. Court of Appeals. (nd,) (Entered: 08/29/2006)
9/6/06		Minute Entry for proceedings held before Judge Victor Marrero: Pretrial Conference held on 9/6/2006. (cd,) (Entered: 09/11/2006)
9/25/06	58	NOTICE of Notice of Appearance and Request for Electronic Notification. Document filed by Alliance for Open Society International, Inc.. (Rosberger, Richard) (Entered: 09/25/2006)
10/16/06	59	ENDORSED LETTER addressed to Judge Victor Marrero from Laura Abel dated 10/13/06 re: counsel for plaintiffs request to provide the court with a further update on the progress and/or results of these surveys on or before 11/13/06. Request granted. The time for plaintiffs to update the court on the survey described above is extended to 11/13/06. So Ordered. (Signed by Judge Victor Marrero on 10/13/06) (dle,) (Entered: 10/16/2006)
10/16/06		Set/Reset Deadlines: Status Report due by 11/13/2006. (dle,) (Entered: 10/16/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/27/06	60	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for 57 Notice of Appeal, filed by United States Department of Health and Human Services, United States Agency for International Development, United States Centers of Disease Control and Prevention, USCA Case Number 06-4035, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp,) Additional attachment(s) added on 11/20/2006 (tp,). (Entered: 10/27/2006)
11/15/06	61	ENDORSED LETTER addressed to Judge Marrero from Laura Abel dated 11/13/06 re plntf request for a status conference: a status conf is set for 12/4/06 at 3:00 pm to address the matter described above by plaintiffs. (Signed by Judge Victor Marrero on 11/15/06) (cd,) (Entered: 11/15/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
11/15/06		Set/Reset Scheduling Order Deadlines: Status Conference set for 12/4/2006 03:00 PM before Judge Victor Marrero. (cd,) (Entered: 11/15/2006)
12/4/06		Minute Entry for proceedings held before Judge Victor Marrero: Status Conference held on 12/4/2006. Parties are to submit an appropriate briefing schedule or alternative plan for determining which plaintiffs can bring forth claims with timing of pending appeal as a factor. (jar,) (Entered: 12/08/2006)
1/26/07	62	NOTICE OF APPEARANCE by Richard Edward Rosberger on behalf of United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services (Rosberger, Richard) (Entered: 01/26/2007)
6/26/07	63	ORDER PLACING CASE ON SUSPENSE: This action be placed on the Court's Suspense Docket pending a ruling by the Court of Appeals for the Second Circuit on dft's appeal of this Court's Order dated 6/30/2006. (Signed by Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Victor Marrero on 6/26/2007) (jar) (Entered: 06/27/2007)
11/30/07		Minute Entry for proceedings held before Judge Victor Marrero: Interim Pretrial Conference held on 11/30/2007. Judge's Decision: Parties to submit letter in 10 days informing the court of their discussions and the contemplated schedule. (djc) (Entered: 12/10/2007)
12/27/07	64	MANDATE of USCA (Certified Copy) as to 57 Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services USCA Case Number 06-4035-cv. Ordered, Adjudged and Decreed that the case is REMANDED to the District Court for further proceedings consistent with this order. Catherine O'Hagan Wolfe, Clerk USCA. Issued As Mandate: 12/21/2007. (nd) (Entered: 12/27/2007)
12/27/07		Transmission of USCA Mandate/ Order to the District Judge re: 64 USCA Mandate,. (nd) (Entered: 12/27/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
2/4/08	65	ENDORSED LETTER addressed to Judge Victor Marrero from Laura K. Abel dated 2/1/08 re: Counsel for plaintiffs request permission to submit an overlength brief regarding Plaintiffs' motions to amend the complaint and to extend the preliminary injunction to cover Global Health Council of Inter Action. Plaintiffs request leave to file a 40-page brief.. ENDORSEMENT: Request granted. The page limitations provision of the Court's Individual Practices is modified to authorize plaintiffs to file a brief not to exceed 40 pages in connection with the motion to amend the complaint and add a party herein. So Ordered. (Signed by Judge Victor Marrero on 2/4/08) (js) (Entered: 02/04/2008)
2/8/08	66	MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 02/08/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
2/8/08	67	MEMORANDUM OF LAW in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit A) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	68	DECLARATION of Rebekah Diller in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	69	DECLARATION of Nils Daulaire in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a

DATE	DOCKET NUMBER	PROCEEDINGS
		Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit A) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	70	DECLARATION of Daniel E. Pellegrom in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	71	DECLARATION of Sam Worthington in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open So-

DATE	DOCKET NUMBER	PROCEEDINGS
		ciety International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	72	DECLARATION of Helene Gayle in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	73	DECLARATION of Pape Gaye in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 02/08/2008)
2/8/08	74	DECLARATION of Mark Sidel in Support re: 66 MOTION for Leave to File A Second Amended Com-

DATE	DOCKET NUMBER	PROCEEDINGS
		plaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit B1, # 4 Exhibit B2, # 5 Exhibit B3, # 6 Exhibit B4, # 7 Exhibit B5, # 8 Exhibit C, # 9 Exhibit D, # 10 Exhibit E, # 11 Exhibit F)(Diller, Rebekah) (Entered: 02/08/2008)
3/6/08	75	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 3/5/2008 re: This Office represents the defendants in the above-named case. I am writing to request an extension of time to respond to plaintiffs' motion to amend the complaint and extend the preliminary injunction to additional parties, as follows: Government's response (now due March 7): March 17; Plaintiffs' reply (now due March 28) April 7. ENDORSEMENT: Request Granted. The briefing schedule with regard to the motion to amend the complaint herein is extended as set forth here-

DATE	DOCKET NUMBER	PROCEEDINGS
		in: motion papers submitted by response 3-17-08; reply 4-7-08. SO ORDERED. (Responses due by 3/17/2008, Replies due by 4/7/2008.) (Signed by Judge Victor Marrero on 3/5/2008) (jmi) (Entered: 03/06/2008)
3/14/08	76	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 3/13/08 re: Counsel for defendant requests an enlargement of the Government's brief due on March 17, in opposition to plaintiffs' motion to amend the complaint and extend the preliminary injunction, from 25 to 40 pages. Plaintiffs previously obtained an equivalent enlargement of their opening brief, and have consented to this request. ENDORSEMENT: Request granted. The page limitations provision of the Court's Individual Practices is modified to authorize The Government to file a brief not to exceed 41 pages in connection with the motion to amend the complaint herein and extend the preliminary injunction. So Ordered. (Signed by Judge Victor Marrero on 3/14/08) (js) (Entered: 03/14/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
3/17/08	77	MEMORANDUM OF LAW in Opposition re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Torrance, Benjamin) (Entered: 03/17/2008)
3/17/08	78	DECLARATION of Benjamin H. Torrance in Opposition re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (Attachments: # 1 Exhibit HHS Guidance, # 2 Ex-

DATE	DOCKET NUMBER	PROCEEDINGS
		hibit USAID AAPD, # 3 Exhibit GHC Member List, # 4 Exhibit DKT Complaint) (Torrance, Benjamin) (Entered: 03/17/2008)
3/17/08	79	NOTICE OF APPEARANCE by Benjamin H. Torrance on behalf of United States Agency for International Development, Andrew Natsios, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services (Torrance, Benjamin) (Entered: 03/17/2008)
4/4/08	80	ENDORSED LETTER addressed to Judge Marrero from Laura K. Abel dated 4/4/08 re: Counsel for Plaintiffs request permission to submit an overlength reply regarding Plaintiffs' motions to amend the complaint and to extend the preliminary injunction to cover Global Health Council and InterAction. ENDORSEMENT: Request GRANTED. The page limitations provision of the Court's Individual Practices is modified to authorize plaintiff's to file a brief not to exceed 26 pages in connection with the

DATE	DOCKET NUMBER	PROCEEDINGS
		motion to amend the complaint herein. (Signed by Judge Victor Marrero on 4/4/08) (tro) (Entered: 04/04/2008)
4/7/08	81	REPLY MEMORANDUM OF LAW in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 04/07/2008)
4/7/08	82	REPLY AFFIDAVIT of Nils Daulaire in Support re: 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction.. Document filed by Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. (Diller, Rebekah) (Entered: 04/07/2008)
8/8/08	83	DECISION AND ORDER: For the reasons stated herein, it is hereby ordered that the motion (docket no. 66) of plaintiffs Alliance for Open

DATE	DOCKET NUMBER	PROCEEDINGS
		Society International (AOSI) and Pathfinder International (Pathfinder) for leave to file a second amended complaint to add Global Health Council (GHC) and InterAction as plaintiffs to this action is GRANTED. The motion of GHC and InterAction for a preliminary injunction, is GRANTED, as set forth herein. DKT, as member of GHC, shall be barred form benefiting from the preliminary injunction. (Signed by Judge Victor Marrero on 8/7/2008) (jpo) (Entered: 08/08/2008)
8/18/08	84	SECOND AMENDED COMPLAINT amending 20 Amended Complaint,, against Henrietta Fore, Global Health Council, United States Agency for International Development, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. Document filed by Global Health Council, InterAction, Alliance for Open Society International, Inc., Pathfinder International, Open Society Institute. Related docu-

DATE	DOCKET NUMBER	PROCEEDINGS
		ment: 20 Amended Complaint,, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International. (dle) (dle). (Entered: 08/19/2008)
8/25/08	85	ENDORSED LETTER addressed to Judge Victor Marrero from Rebekah Diller dated 8/25/2008 re: Counsel writes in response to the Court's request that the parties agree on a schedule for further proceedings in this case. The parties have agreed that any further proceedings in this case should await the issuance of a final regulation by HHS. ENDORSEMENT: Request GRANTED. Further proceedings in this matter are stayed pending the rule making purpose by defendant's Department of Health and Human Services. The Clerk of Court is directed to maintain this action on the Court's suspense docket. So Ordered. (Signed by Judge Victor Marrero on 8/25/2008) (jfe) (Entered: 08/25/2008)
9/2/08	86	ANSWER to Amended Complaint. Document filed by United States Agency for International Development, Andrew Natsios, Henrietta

DATE	DOCKET NUMBER	PROCEEDINGS
		Fore, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. Related document: 84 Amended Complaint,, filed by Alliance for Open Society International, Inc., Open Society Institute, InterAction, Global Health Council, Pathfinder International. (Torrance, Benjamin) (Entered: 09/02/2008)
9/29/08		Minute Entry for proceedings held before Judge Victor Marrero: Telephone Status Conference held on 9/29/2008. Counsel to notify the Court in 1-2 days as to whether each party consents to a conditional order of discontinuance. (tro) (Entered: 10/06/2008)
9/29/08		Minute Entry for proceedings held before Judge Victor Marrero: Telephone Conference held on 9/29/2008. Counsel to notify the Court in 1-2 days as to whether each party consents to a conditional order of discontinuance. (jpo) (Entered: 10/08/2008)
10/6/08	87	NOTICE OF APPEAL from 83 Order on Motion for Leave to File

DATE	DOCKET NUMBER	PROCEEDINGS
		Document. Document filed by United States Agency for International Development, Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (nd) (Entered: 10/06/2008)
10/6/08		Transmission of Notice of Appeal to the District Judge re: 87 Notice of Appeal. (nd) (Entered: 10/06/2008)
10/6/08		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 87 Notice of Appeal,. (nd) (Entered: 10/06/2008)
10/6/08		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 76 Endorsed Letter, Set Deadlines/Hearings,,,,,,, 78 Declaration in Opposition to Motion,, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Julie Louise Gerberding, Andrew Nat-

DATE	DOCKET NUMBER	PROCEEDINGS
		sios, 82 Reply Affidavit in Support of Motion, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 87 Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding, 72 Declaration in Support of Motion, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 66 MOTION for Leave to File A Second Amended Complaint and Motion by Global Health Council and Interaction for a Preliminary Injunction. filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 65 Endorsed Letter, Set Deadlines/Hearings,,,, 69 Declaration in Support of Motion, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 62 Notice of Appearance filed by United States Agency for International De-

DATE	DOCKET NUMBER	PROCEEDINGS
		velopment, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, 67 Memorandum of Law in Support of Motion, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 68 Declaration in Support of Motion, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 58 Notice (Other) filed by Alliance for Open Society International, Inc., 59 Endorsed Letter, 85 Endorsed Letter,, 80 Endorsed Letter,, 84 Amended Complaint,, filed by Alliance for Open Society International, Inc., Open Society Institute, InterAction, Global Health Council, Pathfinder International, 83 Order on Motion for Leave to File Document,, 74 Declaration in Support of Motion,, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 73 Declaration in Support of Motion, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 60 Supplemental

DATE	DOCKET NUMBER	PROCEEDINGS
		ROA Sent to USCA Index,, 64 USCA Mandate, 63 Order Placing Case on Suspense, 75 Endorsed Letter, Set Deadlines,,,,,, 70 Declaration in Support of Motion,, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 77 Memorandum of Law in Opposition to Motion, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Julie Louise Gerberding, Andrew Natsios, 81 Reply Memorandum of Law in Support of Motion, filed by Alliance for Open Society International, Inc., Open Society Institute, Pathfinder International, 79 Notice of Appearance, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Julie Louise Gerberding, Andrew Natsios, 61 Endorsed Letter, 86 Answer to Amended Complaint, filed by

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		ance filed by Alliance for Open Society International, Inc. were transmitted to the U.S. Court of Appeals. (nd) (Entered: 10/06/2008)
10/7/08	88	First Supplemental ROA Sent to USCA (Index). Notice that the Supplemental Index to the record on Appeal for 87 Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-7917, 3 Copies of the index, Certified Supplemental Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (tp) (tp). (Entered: 10/07/2008)
12/23/08	89	ENDORSED LETTER addressed to Judge Victor Marrero from David S. Udell dated 12/23/2008 re: Counsel for Plaintiffs writes requesting that the Court enter the following correspondence into the docket: 12/14/2007 letter from Benjamin Torrance to the Hon. Victor Marrero; 6/23/2008 letter from Rebekah

DATE	DOCKET NUMBER	PROCEEDINGS
		Diller to the Hon. Victor Marrero; and 6/20/2008 letter from Benjamin Torrance to the Hon. Victor Marrero. ENDORSEMENT: Request GRANTED. The Clerk of the Court is directed to enter into the public docket of this action the three letters referred to above and attached to this letter from plaintiffs' counsel. SO ORDERED. (Signed by Judge Victor Marrero on 12/23/2008) (tve) (Entered: 12/23/2008)
12/24/08	90	LETTER addressed to Judge Victor Marrero from Benjamin R. Torrance dated 12/14/08 re: The parties have agreed on the following schedule: Plaintiffs' motion to be served by February 8, 2008; Government's opposition to be served by March 7, 2008; Plaintiffs' reply memorandum. Document filed by United States Agency for International Development, Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (mme) (Entered: 12/24/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
12/24/08	91	LETTER addressed to Judge Victor Marrero from Benjamin R. Torrance dated 6/20/08 re: Counsel writes to inform the Court of a recent decision by the Supreme Court of the United States that affects the res judicate argument advanced by the Government in its recent brief opposing plaintiffs motion to amend the complaint. Document filed by United States Agency for International Development, Henrietta Fore, Julie Louise Gerberding, Michael O. Leavitt, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services. (mme) (Entered: 12/24/2008)
12/24/08	92	LETTER addressed to Judge Victor Marrero from Rebekah Diller dated 6/23/08 re: Counsel writes in response to the government defendants letter. Counsel writes to advise the Court that there are no facts to discover here that would give rise to a rejudicatures defense. Document filed by Alliance for Open Society International, Inc., Global Health Council, Pathfinder Interna-

DATE	DOCKET NUMBER	PROCEEDINGS
		tional, Open Society Institute.(mme) (Entered: 01/05/2009)
6/30/09	93	ORDER: It is hereby ordered that plaintiffs inform the Court, by July 8, 2009, of the status of the regulatory proceedings that had been considered arising out of the matters at issue in this litigation, and of plaintiffs' contemplation with regard to further prosecution of this action. In the event no timely response to this Order is received, the Court may dismiss the action without further notice for lack of prosecution. (Signed by Judge Victor Marrero on 6/30/2009) (jpo) (Entered: 06/30/2009)
7/8/09	94	ENDORSED LETTER addressed to Judge Victor Marrero from Laura Abel dated 7/8/09 re: Counsel for Plaintiffs write in response to the Court's Order of 6/20/09, requiring Plaintiffs to "inform the Court, by 7/8/09, of the status of the regulatory proceedings that has been considered arising out of the matters at issue in this litigation, and of plaintiffs' contemplation with regard to further prosecution of this action. ENDORSEMENT: Plain-

DATE	DOCKET NUMBER	PROCEEDINGS
		tiff's are directed to submit to the Court an updated report on the status of this matter within 60 days of the date of this Order, or any earlier date on which material development occurs regarding the matters described above. (Signed by Judge Victor Marrero on 7/8/09) (tro) (Entered: 07/08/2009)
7/20/09		Minute Entry for proceedings held before Judge Victor Marrero: Telephone Conference held on 7/20/2009. Parties discussed options for closing the case pending administrative review of policies by Government. (mro) (Entered: 07/21/2009)
7/29/09	95	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 7/28/2009 re: Counsel writes to inform the Court that on July 24, 2009 the Court of Appeals entered the parties stipulation to withdraw the government's appeal without prejudice to reinstatement by January 8, 2010. ENDORSEMENT: The Clerk of Court is directed to file this letter in the public docket of this case. So Ordered. (Signed by Judge Victor

DATE	DOCKET NUMBER	PROCEEDINGS
		Marrero on 7/28/2009) (jfe) (Entered: 07/29/2009)
7/29/09	96	MINUTE ORDER PURSUANT TO MEMORANDUM FOR THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, DATED JUNE 15TH, 1973: This case having been pending for more than three years, all presently contemplated proceedings having been completed, and there having been no action for more than twelve months, there appears to be no further reason at this time to maintain this action as open for statistical purposes, the Clerk is instructed to complete a JS-6 closing report for this case. Nothing contained in this minute order shall be considered a dismissal or disposition of this matter, and should further proceedings in it become necessary or desirable, any party may initiate it in the same manner as if this minute order had not been entered. (Signed by Judge Victor Marrero on 7/29/2009) (jfe) (Entered: 07/29/2009)
9/30/09	97	TRUE COPY ORDER of USCA as to 87 Notice of Appeal, filed by United States Agency for Interna-

DATE	DOCKET NUMBER	PROCEEDINGS
		tional Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 084917-cv. Order withdrawing appeal by consent without prejudice to reinstatement, the appeal is hereby withdrawn without costs and without attorney's fees and without prejudice, subject to reactivation of the appeal by appellant's counsel by written notice to the Clerk of this Court by 1/8/10. If not thus timely reactivated the appea shall be subject to dismissal. Catherine O'Hagan Wolfe, Clerk USCA. Certified: 9/24/2009. (nd) (Entered: 09/30/2009)
1/6/10	98	ENDORSED LETTER addressed to Judge Victor Marrero from Rebekah Diller dated 1/6/2010 re: Counsel for Plaintiffs write to the Court to provide and updated report on the status of regulatory proceedings related to this matter. ENDORSEMENT: The Clerk of Court is directed to enter this letter

DATE	DOCKET NUMBER	PROCEEDINGS
		and enclosed document in the public record of this action. (Signed by Judge Victor Marrero on 1/6/2010) (tro) (tro). (Entered: 01/06/2010)
1/13/10	99	ORDER of USCA (Certified Copy) as to 87 Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-4917-cv. This appeal was disposed by a so-ordered stipulation withdrawing the appeal when reinstated by the Benjamin H. Torrance counsel for appellants timely submission of notice of that effect. Counsel for the appellants Alliance for Open Society International et al., has submitted a timely notice of reinstatement. IT IS HEREBY ORDERED that the appeal is reinstated. Catherine O'Hagan Wolfe, Clerk USCA. Certified: 1/11/2010. (nd) (Entered: 01/13/2010)
1/15/10	100	ORDER of USCA (Certified Copy) as to 87 Notice of Appeal, filed by

DATE	DOCKET NUMBER	PROCEEDINGS
		United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-4917-cv. This appeal was disposed of by a so-ordered stipulation withdrawing the appeal when reinstated by the Defendants-Appellants timely submission of notice to that effect. Counsel for the Appellants has submitted a timely Notice of reinstatement. IT IS HEREBY ORDERED that the appeal is reinstated. Catherine O'Hagan Wolfe, Clerk USCA. Certified: 1/14/2010. (nd) (Entered: 01/15/2010)
2/21/12	101	MANDATE of USCA (Certified Copy) as to 87 Notice of Appeal, filed by United States Agency for International Development, United States Centers of Disease Control and Prevention, United States Department of Health and Human Services, Michael O. Leavitt, Henrietta Fore, Julie Louise Gerberding USCA Case Number 08-4917-cv.

DATE	DOCKET NUMBER	PROCEEDINGS
		Ordered, Adjudged and Decreed that the District Court's grant of preliminary injunctive relief is AFFIRMED in accordance with the opinion of this Court. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 02/17/2012. (nd) (Additional attachment(s) added on 2/21/2012: # 1 Opinion) (nd). (Entered: 02/21/2012)
2/21/12		Transmission of USCA Mandate/ Order to the District Judge re: 101 USCA Mandate,,. (nd) (Entered: 02/21/2012)
3/30/12	102	ORDER: With reference to the Mandate of the United States Court of Appeals for the Second Circuit dated February 21, 2012, the parties are directed to inform the Court by April 6, 2012 as to their contemplation regarding any further litigation before this Court, or to settle a final order reflecting a stipulated resolution that could serve as the basis for any further appellate proceedings. (Signed by Judge Victor Marrero on 3/27/2012) (js) (Entered: 03/30/2012)

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/12	103	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 4/6/2012 re: Counsel for the parties write in joint response to the Court's Order, dated March 30, 2012, requiring the parties "to inform the Court by April 6, 2012, as to their contemplation regarding any further litigation before this Court, or to settle a final order reflecting a stipulated resolution that could serve as the basis for any further appellate proceedings." ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Government. So ordered. (Signed by Judge Victor Marrero on 4/10/2012) (rjm) (Entered: 04/10/2012)
5/1/12	104	ENDORSED LETTER addressed to Judge Victor Marrero from Benjamin H. Torrance dated 4/24/2012 re: I am writing to inform the Court that the government has sought and obtained from the Supreme Court an extension of time in which to petition for certiorari from the Second Circuit's judgment of

DATE	DOCKET NUMBER	PROCEEDINGS
		July 6, 2011. ENDORSEMENT: The Clerk of Court is directed to enter into the public record of this action the letter above submitted to the Court by the Government. So ordered. (Signed by Judge Victor Marrero on 4/28/2012) (rjm) (Entered: 05/01/2012)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, AND PATHFINDER INTERNATIONAL, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT AND ANDREW S. NATSIOS, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS

[Jan. 24, 2006]

SUPPLEMENTAL DECLARATION OF DANIEL E. PELLEGROM

I, DANIEL E. PELLEGROM, hereby declare as follows:

1. I am, and have been since 1984, the President of Pathfinder International ("Pathfinder").

2. I submit this declaration in support of Plaintiffs' motion for a preliminary injunction. In particular, I submit this declaration to place into the record Path-

finder's relevant cooperative agreements with defendants United States Agency for International Development ("USAID") and the United States Centers for Disease Control and Prevention ("CDC") as well Pathfinder's subagreements with other organizations to receive funds originating from USAID and CDC.

3. Described below are Pathfinder's current cooperative agreements and subagreements that award funds made available under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act., 22. U.S.C. § 7601 *et seq.* Attached hereto are relevant pages from each agreement or subagreement; the full agreements and subagreements will be submitted upon request.

DESCRIPTION OF EXHIBITS

4. Attached as Exhibit 1 are relevant pages from Cooperative Agreement 388-A-00-02-00060-00 between USAID and Pathfinder, which provides for Pathfinder to support the "NGO Service Delivery Program" in Bangladesh between May 23, 2002 and September 30, 2006.

5. Attached as Exhibit 2 are relevant pages from Cooperative Agreement 527-A-00-04-00109-00 between USAID and Pathfinder, which provides for Pathfinder to upgrade health services, expand contraceptive security, and support health education in Peru between October 1, 2004 and September 30, 2007.

6. Attached as Exhibit 3 are relevant pages from Cooperative Agreement 656-A-00-05-00028-00 between USAID and Pathfinder, which provides for Pathfinder to increase the use of child survival services in the Maputo Province of Mozambique between February 23, 2005 and January 31, 2008.

7. Attached as Exhibit 4 are relevant pages from a "Leader with Associate" Cooperative Agreement GPO-A-00-05-00027-00 between USAID and Pathfinder, which provides for Pathfinder to extend service delivery for a "Reproductive Health and Family Planning Project," which helps families in Sudan space or limit childbearing. The agreement runs between September 30, 2005 and September 29, 2010.

8. Attached as Exhibit 5 are relevant pages from Cooperative Agreement 623-A-00-06-00013-00 between USAID and Pathfinder, which provides for Pathfinder to provide home-based care and HIV/AIDS education in Kenya between December 31, 2005 and August 30, 2006.

9. Attached as Exhibit 6 are relevant pages from Cooperative Agreement U62/CCU124490-0l between the CDC and Pathfinder, which provides for Pathfinder to provide home-based care in Tanzania from September 1, 2004 to August 31, 2009.

10. Attached as Exhibit 7 are relevant pages from Cooperative Agreement U62/CCU124501-01 and Amended Cooperative Agreement U62/CCU124501-01-1 between Pathfinder and CDC; which provides for Pathfinder to prevent the transmission of HIV/AIDS from mothers to their children in Kenya between September 30, 2004 and March 31, 2010.

11. Attached as Exhibit 8 are relevant pages from Cooperative Agreements U62/CCU124418-02 and U62/CCU124419-02 between Pathfinder and CDC, which provides for Pathfinder to provide psychosocial support and peer counseling for HIV-infected women and their families in Botswana between September 30, 2004 and September 29, 2009.

12. Attached as Exhibit 9 are relevant pages from Cooperative Agreement U62/CCU124490-02 between Pathfinder and CDC, which provides for Pathfinder to provide home-based care in Tanzania between September 1, 2004 and August 31, 2009.

13. Attached as Exhibit 10 are relevant pages from a subagreement between Pathfinder and Christian Children's Fund Kenya, which provides for Pathfinder to support orphans and other children affected by HIV/AIDS in Kenya. The agreement runs between between March 18, 2005 and September 30, 2006. Christian Children's Fund Kenya holds the Prime Cooperative Agreement with USAID (GPO-A-00-05-00016-00).

14. Attached as Exhibit 11 are relevant pages from a subagreement between Pathfinder and Family Health International which provides for Pathfinder to establish and support community based HIV/AIDS prevention programs in Kenya through January 31, 2006. Family Health International holds the Prime Cooperative Agreement with USAID (HRN-A-00-97-0017-00).

15. Attached as Exhibit 12 are relevant pages from a subagreement between Pathfinder and EngenderHealth, which provides for Pathfinder to prevent the transmission of HIV/AIDS from mothers to their children in three communities in the Arusha region of Tanzania between July 1, 2005 and June 30, 2006. EngenderHealth holds the Prime Cooperative Agreements with USAID (GPH_A_00-02-0001 1-00 and 623-A-00-03-00069-00).

16. Attached as Exhibit 13 are relevant pages from a Subagreement between Pathfinder and Pact, Inc., which provides for Pathfinder to improve Sexually Transmitted Infection ("STI") and HIV support services in the public

and private sectors in Vietnam between August 30, 2005 and August 29, 2006. Pact, Inc. holds the Prime Cooperative Agreement with USAID (GPH-A-00-01-00-00007-00).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Jan. [24], 2006
Watertown, Massachusetts

/s/ DANIEL E. PELLEGROM
DANIEL E. PELLEGROM

Exhibit 5

[SEAL OMITTED]
USAID KENYA
FROM THE AMERICAN PEOPLE

December 31, 2005

Mr. Charles Thube
Pathfinder International
Mezzanine Floor, International House
Mama Ngina Street
P.O. box 48147-00100
Nairobi, Kenya

Subject: Cooperative Agreement 623-A-00-06-00013-00

Dear Mr. Thube:

Pursuant to the authority contained in the Foreign Assistance Act of 1961, as amended, the U.S. Agency for International Development (hereinafter referred to as "USAID" or "Grantor") hereby grants to Pathfinder International (hereinafter referred to as "Pathfinder" or "Recipient"), the sum of $2,570,800 to provide support for the implementation of the "COPHIA II", as described in Attachment 1, entitled "Schedule" and Attachment 2, entitled "Program Description" of this award.

This award is effective and obligation is made as of the date of this letter and shall apply to commitments made by the Recipient in furtherance of program objectives during the period beginning with an Effective Date of same date as this letter and Estimated Completion Date of August 30, 2006. USAID shall not be liable for reim-

bursing the Recipient for any costs in excess of the obligated amount.

This award is made to Pathfinder on condition that the funds will be administered in accordance with the terms and conditions as set forth in 22 CFR 226, entitled "Administration of Assistance Awards to U.S. NonGovernmental Organizations"; Attachment 1, entitled "Schedule", and Attachment 2, entitled "Program Description" and "The Mandatory and Required As Applicable Standard Provisions", Attachment 3.

In the space provided below, please sign the original and each copy of this letter to acknowledge your acceptance of this award and return the original and all but one copy to the Agreement Officer.

Sincerely,

/s/ GARY JUSTE
GARY JUSTE
Regional Agreement Officer
USAID/REDSO/EAA

Attachments
1. Schedule
2. Program Description

The terms of this Agreement are acceptable to the Recipient:

BY: /s/ [CHARLES THUBE]

TITLE: [COUNTRY REPRESENTATIVE]

DATE: [JANUARY 3, 2006]

* * * * *

Associate Cooperative Agreement 623-A-00-06-0013-00

II. Limitation on the Use of Funds

The following must be included in the Standard Provisions of any grant or cooperative agreement or subagreement funded with FY04-FY08 HIV/AIDS funds with a U.S. nongovernmental organization, non-U.S., non-governmental organization or public international organizations.

"PROHIBITION ON THE PROMOTION OR ADVOCACY OF THE LEGALIZATION OR PRACTICE OF PROSTITUTION OR SEX TRAFFICKING (ASSISTANCE) (JUNE 2005)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(b) Except as noted in the second sentence of this paragraph, as a condition of entering into this agreement or any subagreement, a non-governmental organization or public international organization recipient/subrecipient must have a policy explicitly opposing prostitution and sex trafficking. The following organizations are exempt from this paragraph: the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organiza-

tion; the International AIDS Vaccine Initiative; and any United Nations agency.

(c) The following definition applies for purposes of this provision: Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. 7102(9).

(d) The recipient shall insert this provision, which is a standard provision, in all subagreements.

(e) This provision includes express terms and conditions of the agreement and any violation of it shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action Case No.:

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., AND OPEN SOCIETY INSTITUTE, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET, AL., DEFENDANTS

[Aug. 16, 2006]

DECLARATION OF RUTH W. MESSINGER

---

1. I serve as the President and Executive Director of American Jewish World Service (AJWS), a humanitarian organization providing non-sectarian grassroots development and emergency relief to people in developing nations. Our organization is working, among other things, to stop the spread of HIV/AIDS in various countries overseas.

* * * * *

3. In my capacity as President and Executive Director of AJWS, I have administered our organization's HIV/AIDS prevention programs. AJWS provides approximately $1.2 million annually to fifty-nine grassroots organizations in Africa, Asia and Latin America

carrying out integrated programming to address the HIV/AIDS pandemic. The programs include peer-led prevention efforts, care and support for people living with HIV/AIDS and orphans and vulnerable children, advocacy campaigns for access to and education about anti-retroviral treatment, and anti-stigma work. AJWS supports local groups and associations of people living with HIV that are devising effective and innovative strategies to limit the spread and mitigate the effects of HIV/AIDS in their communities.

* * * * *

8. American Jewish World Service has never had a policy on prostitution. As an international development and human rights organization, we generally do not adopt policies on particular political issues. Especially since we operate in a variety of African, Asian, and Latin American countries, providing services to clients from multiple cultures and backgrounds even within each particular country, we make every effort to remain neutral on issues of political or cultural conflict.

9. American Jewish World Service does not wish to adopt a policy on prostitution, and believes that it would be harmful to our organization to do so. AJWS would not consider adopting a policy but for the U.S. government's policy.

10. By compelling us to speak in order to continue receiving USAID funding, this mandate harms our organization's First Amendment rights. It further violates those rights by imposing limits on our *private*, non-federally-funded speech and activities. While USAID funding comprised approximately 5 percent of our budget for HIV/AIDS prevention and care work in 2004/2005,

all of our work would be subject to the policy mandate. Because USAID seeks to force us to adopt this policy, we are concerned that we will be forced to ensure that even our non-USAID-funded work conforms to what would be an organization-wide mandate.

11. Finally, our organization is harmed because we would be forced to give up the right to even engage in debate about significant matters of public health that may relate to prostitution, *even when that debate is funded by wholly private funds*. For example, we often study the efficacy of our work and the work of partner organizations in the field in order to determine what approaches work best at preventing HIV, so that we and others can replicate those models. With the newly-mandated USAID policy outlined in AAPD 05-04, we would be constrained in the conclusions that we can reach.

12. We are also deeply troubled by the vagueness of the requirement. We are certainly not "pro-prostitution." However, we have received no guidance from USAID as to what it means to be opposed to prostitution. For instance, in Thailand AJWS supports an organization that provided relief and vocational training for sex workers affected by the Tsunami. In India, we support an organization that provides evening care for the children of prostitutes, and in Kenya we support an organization that provides AIDS prevention and care for sex workers. We are unclear as to how our support for the critically important AIDS prevention and care work of these organizations, representing diverse opinions on the debate over legalization of prostitution, would be perceived by USAID.

* * * * *

14. Compelling us to adopt this policy to obtain future funding is also harmful because, due to the policy, our organization may be seen as one that stigmatizes vulnerable and marginalized sex workers, and our ability to offer meaningful help to that population will likely be compromised. We know from experience that the challenges of reaching sex workers are vast. The programs that have been most successful in reaching out to sex workers to prevent the spread of HIV have been those that approach sex workers not with a message of condemnation of the situations in which the men and women find themselves but rather in a non-judgmental fashion designed to address their health and other needs.

* * * * *

Pursuant to 28 U.S.C. § 1746, I swear or affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge.

/s/ RUTH W. MESSINGER
RUTH W. MESSINGER

New York, New York
DATED this 16 day of Aug., 2005

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS

[Feb. 4, 2008]

DECLARATION OF SAM WORTHINGTON

I, SAM WORTHINGTON, hereby declare as follows:

1. I am the President and Chief Executive Officer of InterAction: The American Council for Voluntary International Action ("InterAction"). I have held that position since October 2006. I previously served as Chief Executive Officer of Plan USA, a global, 62-country, child-focused development organization.

* * * * *

4. InterAction was founded in 1984 with the purpose of convening and coordinating U.S.-based, non-governmental organizations ("NGOs") that work in the fields of international development and humanitarian aid. InterAction's mission is to assist its members in improving their own practices and to advocate for policy

issues that affect its members and the millions of people they serve worldwide. With one hundred and seventy members, InterAction is the largest alliance of United States-based international development and humanitarian non-governmental organizations.

5. Interaction's members, all of which are not-for-profit, tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code, are headquartered in twenty-five states, including New York. InterAction member organizations are both faith-based and secular and operate in every country in the developing world. Member organizations foster economic and social development; promote public health; provide relief to those affected by disaster and war; assist refugees and internally displaced persons; advance human rights; support gender equality; protect the environment; address population concerns; and press for more equitable, just, and effective government policies.

6. InterAction realizes its mission by providing a forum for professional consultation, coordination, and concerted action. Committees and their working groups, composed of InterAction members, engage in dialogue and advocacy with government agencies such as Defendants United States Agency for International Development ("USAID") and Department of Health and Human Services ("HHS") to improve the effectiveness of U.S. foreign assistance and promote policy solutions to eradicate poverty and disease, including HIV/AIDS. InterAction has developed considerable expertise in working with public and private partners to further its members' global health initiatives and objectives.

7. InterAction's member organizations receive more than $1 billion annually from the United States Government, primarily through Defendant USAID although they also receive funds from Defendants United States Department of Health and Human Services ("HHS") and United States Centers for Disease Control and Prevention ("CDC") (collectively "HHS"). A portion of those funds is for programs authorized by the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act").

8. InterAction member organizations also receive more than $7 billion in annual contributions from private individuals, foundations, and corporations. Some also receive funds from United Nations agencies, the World Bank, the European Community Humanitarian Office, and national governments, including those of the United Kingdom and France.

* * * * *

How the Policy Requirement And Guidelines Harm InterAction and its Members

21. The policy requirement continues to harm InterAction and its members in a number of ways, which the guidelines have only perpetuated.

a. Compelled Speech

22. First, the policy requirement forces international NGOs that generally prize their independence from government to become a mouthpiece for the U.S. government's position on a particular social issue. For these members, the adoption of a government-mandated, organization-wide policy on this or any issue violates dear-

ly held principles of independence that are fundamental to their operation as non-governmental organizations.

23. The guidelines do nothing to remedy this problem. Even if members were able to cordon off some privately funded activity to a legally, financially, and physically separate affiliate, as the guidelines contemplate, the NGO that receives Global AIDS Act funds would still be forced to adopt an organizational policy that would undermine its independence and force it to parrot the government's message as its own.

24. Moreover, due to separate rules that require USAID grantees to have substantial private funding, the grantee NGO would still possess some degree of private funds that would be subject to the policy requirement. U.S.-based private voluntary organizations must be registered with USAID in order to be eligible for USAID funding. *See* 22 C.F.R. § 203.1(a). In order to register as a private voluntary organization, an NGO must "solicit[] and receive[] cash contributions from the U.S. general public." *id* § 203.3(b). Therefore, even if InterAction members were able to set up separate affiliates—an unviable proposition for the reasons I explain below—the policy requirement would always reach some portion of InterAction members' private funds.

b. Viewpoint Discrimination

25. Second, the policy requirement continues to force InterAction members who wish to remain neutral on the issue of prostitution to take a government-mandated position. Many members believe that prostitution causes serious health, psychological, and physical risks for women and work to address those risks and assist women in finding alternatives. However, they also believe

that by forcing them to explicitly oppose prostitution, the policy requirement stigmatizes one of the very groups whose trust they must earn to conduct effective HIV/AIDS prevention and forces them to approach those engaged in prostitution in what will be perceived as a judgmental manner.

26. Many members are aware that Defendants have construed the policy requirement as prohibiting advocacy for the elimination of criminal penalties against women engaged in prostitution. Given the variety of legal regimes relating to prostitution in the countries in which InterAction members operate, some members object to the mandatory adoption of a policy position that contradicts the policy of some of the countries in which they are operating.

27. The guidelines do not remedy this problem. An independent, non-profit member organization still must adopt a particular position in order to be eligible for Global AIDS Act funding and, as described above, even if some private funds were segregated to create an affiliate, the grantee organization would still possess private funds encumbered by the policy requirement.

c. The Guidelines Massively Burden Private Speech

28. The third way in which the policy requirement and guidelines harm InterAction and its members is that members engage in a significant amount of activity not funded by the U.S. government that could be barred by Defendants' overly broad construction of the policy requirement. The Defendants' ban on the use of the non-U.S. government funds possessed by InterAction members to do work that Defendants construe as being insufficiently opposed to prostitution restricts members

from engaging in speech and HIV-prevention activities with their private funds.

29. Members have expressed concern about the policy requirement's impact on their commitments to private funders to do HIV/AIDS prevention work. For example, the policy requirement has threatened the privately funded HIV/AIDS prevention work of InterAction member CARE with sex worker organizations and networks. In a letter dated July 15, 2005 to the Hon. Andrew Natsios, Representative Souder and 27 other members of Congress accused InterAction member CARE of violating the pledge requirement by promoting a "rights-based" approach to prostitution, which the signatories equate with advocacy for the legalization of prostitution and its cultural acceptance as a legitimate form of employment. In the same letter, the members of Congress also accused InterAction member International Center for Research on Women of holding a "pro-prostitution" stance. A copy of this letter is attached hereto as Exhibit B. In a subsequent letter dated December 7, 2005 to the Hon. Andrew Natsios, Rep. Souder again accused CARE of violating the policy requirement by providing funding to an Indian organization that he said advocates for the decriminalization of adult sex work. A copy of this letter is attached hereto as Exhibit C. As the accompanying Declaration of Helene Gayle, President and Chief Executive Officer of CARE, in support of this motion, attests, in June 2006, after the issuance of the Court's decision holding that the policy requirement was unconstitutional as applied to AOSI and Pathfinder, USAID officials made inquiries to CARE about its association with this organization, to

which CARE provides private funding in connection with a tuberculosis prevention program.

30. Similarly, as the accompanying Declaration of Dan Pellegrom, President of InterAction member Pathfinder International, in support of this motion attests, if Pathfinder were not protected by the preliminary injunction in this case, it might have to censor discussions of its privately funded program that conducts HIV/AIDS prevention with sex workers in India as well as the speech of a privately funded Brazilian employee who is slated to facilitate discussions at Brazil's upcoming National Consultation on Prostitution, HIV/AIDS and Human Rights.

31. The inability of InterAction members to speak freely about the lessons of their work undercuts several of InterAction's main purposes as a membership organization. Through an annual conference, frequent meetings, working groups, and publications, InterAction members share best practices and lessons learned from their humanitarian work. However, discussion about the relationship between HIV and prostitution as well as best practices for HIV prevention among sex workers cannot be held freely due to the policy requirement.

32. The guidelines do not fix this problem. Although the guidelines purport to create an opportunity for grantees to engage in forbidden speech through a legally, financially, and physically separate affiliate, they impose such massive burdens on the creation of the affiliate that it is not a viable option for our members.

33. Creating a legally separate affiliate in the international context is a far different proposition from creating one domestically. Most countries in which InterAction members operate have requirements that all NGOs reg-

ister with the government in order to operate. An InterAction member that operates in twenty countries, who wished to speak freely through an affiliate, would have to navigate lengthy and cumbersome registration processes in each of those countries in order to create a functioning, legally separate entity. In almost all cases, local counsel would have to be hired in each country in which the member sought to register the affiliate, making the process quite costly.

34. It is far from certain that a member would even be able to obtain approval for an affiliate in multiple developing countries. InterAction members frequently report long delays and difficulties in registering in various developing countries. For example, it recently took InterAction member Mercy Corps ten months to register an entity in Jordan to provide urgently needed relief to Iraqi refugees. Another InterAction member, International Medical Corps, had its application for registration denied by the Jordanian Ministry of Social Development in November 2007.

35. If a member were somehow able to obtain permission to operate an affiliate in multiple countries, that affiliate would have a very hard time obtaining funding. If the new affiliate were to be government-funded, it would likely be barred from USAID funding opportunities until it had a record of achievement. *See* 22 U.S.C. § 2151u(a) (organization not eligible to receive funds until it has "demonstrated a capacity to undertake effective development activities."); 22 C.F.R. § 203.3(f)(4) (requiring entity to have been incorporated for at least 18 months in order to register as a private voluntary organization eligible for USAID funding). If the new affiliate were to be privately funded, it would be at a severe dis-

advantage competing with other organizations for non-U.S.-government funding because it would have no track record whatsoever.

33. Even if an InterAction member were able to jump these hurdles and register and fund an affiliate in multiple countries, the affiliate would be a completely separate entity from the InterAction member. The guidelines require that the affiliate be governed by a separate board and run by separate management. For non-profit organizations, as all of our members are, the board of directors generally controls and speaks for the organization. This principle is embodied in InterAction's Private Voluntary Organization Standards, with which all InterAction members must certify compliance every two years. Those standards provide that a member's board must act as the organization's governing body, accepting responsibility for oversight of all aspects of the organization. Thus, an InterAction member organization will not be able to speak through a separate entity that has a separate board of directors.

36. The requirement of separate personnel also poses unique difficulties in the international setting. Most field offices our headed by "country representatives," who ideally have experience working in the region and in the NGO's programming areas. Very often, an NGO will need to hire the country representative and other senior staff with relevant expertise from outside the country in which the field office is based. To do so, an NGO will have to navigate local visa requirements. Often, visa applications cannot even be started until after an NGO has registered in a country. In many countries, the process requires an NGO to hire a local attorney and show that it could not find any country residents qualified for

the position. The requirement to operate a separate affiliate would double the burdens of these laws on our members.

37. The requirement of separate bank accounts poses similar burdens. Many countries have rules that make it difficult to open a new bank account without specific government authorization and approval. Often, if an official from an NGO's headquarters wants to be a signatory to the account, he will have to travel in person to the bank. Opening a separate account for a new entity will thus entail its own lengthy process.

38. Finally, the requirement of separate physical facilities, equipment and supplies additionally burdens our members. In many developing countries where InterAction members operate, members must import computers, printers, networking supplies and other office equipment. To do so for a second office would not only be expensive, but would also require NGOs to navigate cumbersome local customs laws for a second time. In addition, all of these requirements would divert funds that should be spent saving lives in the developing world into unnecessary, duplicate administrative costs.

39. All of these requirements run counter to our members' efforts to run foreign aid operations efficiently and with as little administrative overhead as possible. Members are often judged by their donors on the percentage of funds that go directly toward service. InterAction's itself, in its Private and Voluntary Organization Standards, which were designed to ensure and strengthen public confidence in the integrity, quality, and effectiveness of member organizations and their programs, requires members' combined fundraising and administra-

tion costs to be kept to the minimum necessary to meet the agency's needs. Allocations of expenditures to administration, fundraising, and program services shall reflect the organization's purposes and actual activities, the standards further provide. The requirement to squander funds on duplicate registrations, bank accounts, staff, offices, equipment and supplies—solely in order to be able to speak freely on an issue of public policy—flies in the face of this principle.

40. In addition, all of these requirements are likely to draw suspicion from local authorities who will not understand why an organization that already operates in a country now must do so through a legally separate entity, with separate personnel, with separate bank accounts, and out of separate offices.

Vagueness

41. The fourth way in which the policy requirement harms InterAction and its members is its unresolved vagueness. From the beginning of the policy requirement's implementation, members have been unsure of what activities and speech they may and may not engage in.

42. Members have reported a wide variety of responses by organizations and USAID officials to the policy requirement. Some members have reported that local USAID missions in countries in which they operate have demanded to see their policies opposing prostitution while others have reported that missions did not demand to see their policies. Some members have reported that, in the absence of guidance from the Defendants, primary recipients of U.S. government funds have inserted

their own language into subcontracts about what constitutes compliance with the policy requirement.

43. After operating in this uncertain environment for more than two years, the humanitarian community had hoped that the guidelines would finally provide some clarity. But the guidelines have failed to answer the most basic questions about just what activities and speech are restricted.

44. In addition, while the guidelines require "physical[] and financial[] separation" of funding recipients from the affiliated organizations, they do not provide clear guidance regarding what will be considered physically and financially separate enough. For example, USAID states one factor it will examine is "[t]he extent to which USAID, the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements." Yet USAID gives no indication of how it will assess "public association." Similarly, USAID states it will examine "[t]he extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present and signs and materials that could be associated with the affiliated organization or restricted activities are absent." Again, the guidelines give InterAction members no guidance on how much usage would be enough to satisfy this requirement.

45. Given the severe consequences for violating the policy requirement, in the absence of such guidance, members will have to ensure maximum separation to avoid any possibility of running afoul of the guidelines.

Moreover, they will now have to scrutinize very carefully their relationships with collaborating organizations and grantees to determine whether they are closely affiliated enough to raise questions about whether the other organization's views may be attributed to the member.

46. For all these reasons, the anti-prostitution policy requirement continues to irreparably harm InterAction and its members.

47. I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 4, 2008
Washington, District of Columbia

/s/ SAM WORTHINGTON
SAM WORTHINGTON

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., AND OPEN SOCIETY INSTITUTE, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANT

[Aug. 12, 2005]

DECLARATION OF MAURICE I. MIDDLEBERG

I, MAURICE I. MIDDLEBERG, hereby declare as follows

1. I currently serve as the Acting President of EngenderHealth. EngenderHealth is a private, non-governmental, non-profit, non-sectarian organization whose mission is to ensure that reproductive health services—including family planning, maternal health and HIV/AIDS—are safe, available and sustainable in developing nations. EngenderHealth currently has programs in nineteen developing countries. In fulfilling its mission, EngenderHealth provides technical assistance, training, and information to improve services where resources are scarce. Approximately 75% of its $49 million budget consists of funds from the U.S. Agency for In-

ternational Development (USAID), with the remainder from private and multilateral sources (such as United Nations agencies). EngenderHealth is a membership organization, with approximately 10,000 individual members.

* * * * *

3. In my capacity as Acting President and Executive Vice President of EngenderHealth, I have over-all responsibility for EngenderHealth's programs, including our HIV/AIDS program. EngenderHealth's HIV/AIDS program focuses on a broad spectrum of HIV prevention, care, and treatment strategies. EngenderHealth works with its overseas partners to introduce and improve management of sexually transmitted infections, voluntary HIV counseling and testing, prevention of mother-to-child transmission, infection prevention, HIV care and support, counseling of pregnant and postpartum women, and HIV prevention counseling. We facilitate communication between health providers and the communities they serve to ensure services are responsive to the needs, concerns and perceptions of clients. EngenderHealth also works with providers to overcome fears and biases that can result in stigma and discrimination, which can limit access to and quality of care for those who need it most. Underlying all of EngenderHealth's approaches is an emphasis on the rights and needs of all clients, particularly those living with HIV/AIDS.

4. Some of the projects in our organizational HIV/AIDS portfolio are funded in whole or in part by USAID. Others are funded by private donors, the Glob-

al Fund to Fight AIDS, Tuberculosis and Malaria and agencies of the United Nations.

5. Under the terms of USAID Acquisition and Assistance Policy Directive (AAPD) 05-04, EngenderHealth is required to certify that the organization has a policy "explicitly opposing prostitution and sex- trafficking" as a condition to receiving USAID funds, including funding for on-going projects. This mandated policy will necessarily apply to the entire organization, irrespective of whether the source of funds for a particular project is the U.S. Government, a private donor or a multilateral institution.

* * * * *

7. On July 14, 2005, EngenderHealth received a letter from USAID demanding that we sign a certification stipulating that we were in compliance with AAPD 05-04 and that this certification be returned by fax "as soon as possible" (underlining appears in the original). (Exh. B). EngenderHealth's receipt of $1.6 million to support an HIV/AIDS program in Kenya that strengthens prevention of maternal-to-child transmission of HIV and voluntary counseling and testing services was made conditional on signing the certification.

8. On July 27, 2005, subsequent to the adoption of an organizational policy on prostitution and trafficking, I signed the certification. The certification was transmitted to USAID with a cover letter expressing our concerns about the legality and programmatic impact of the certification requirement. (Exh. C). As set forth in the letter, EngenderHealth signed the newly required certification with great reluctance.

* * * * *

10. In a letter dated February 25, 2005, I joined the leaders of thirteen major health and humanitarian organizations in a letter to Mr. Randall Tobias, Coordinator of the U.S. Global AIDS Program, a program of the State Department, protesting the proposed implementation of what was to become AAPD 05-04. In that letter, we pointed to both the potential harm of the pending policy to our individual and collective mission, as well as to the dubious legality and constitutionality of the effort to compel speech. (Exh. D).

* * * * *

13. Cognizant of the wide diversity of cultures, legal systems and beliefs in the many countries in which we work, EngenderHealth is extremely circumspect in adopting public policy positions that may impede our ability to carry out our mission effectively. When and if the organization chooses to adopt an organizational position on a matter of health policy, it is only after intensive study and extensive consultation that can last months or years. EngenderHealth would never adopt a policy on a highly controversial issue with the extraordinary and unseemly haste demanded by USAID, were it not for the coercion and compulsion of having funding for our life-saving HIV/AIDS programs being withheld.

14. Prostitution is an example, *par excellence*, of the controversies in the reproductive health field. For many activists and public health professionals, the very term prostitution is offensive and alternative terms, such as "sex work", are preferred. The U.S. Government's policy on prostitution as applied to other nations is highly controversial. For example, the U.S. position on prosti-

tution has been the subject of a bitter controversy between Brazil and the United States. The Government of Brazil has returned a $40 million grant to the United States rather than accommodate U.S. policy and the Brazilian Ministry of Health has condemned U.S. policy in very harsh terms. (*see* Exh. E).

15. In Brazil, EngenderHealth has a project aimed at preventing maternal-to-child transmission of HIV/AIDS that is funded by the United Nations Population Fund. Absent the compulsion of AAPD 05-04, EngenderHealth would not have taken a position on the legal status of prostitution or issued a statement "explicitly opposing prostitution", as doing so may risk alienating our Brazilian hosts, our United Nations donor, or USAID. Countries in which EngenderHealth works have widely varying laws, regulations and *de facto* regimes governing "prostitution", from highly tolerant to harshly punitive. EngenderHealth does not wish to condone or condemn any particular approach at this time. Because controversy on the legal and *de facto* status of prostitution may erupt between the United States and other countries, EngenderHealth wishes to have the option of not expressing a position on this issue at this time.

16. EngenderHealth is fully cognizant of the serious physical and psychological risks associated with sex work and deplores the exploitation of people in all its forms, including trafficking. Nonetheless, EngenderHealth believes that USAID's application of Section 301(f) to U.S. based organizations will be detrimental to the mission of EngenderHealth for the following reasons:

a. Section 301(f) of Pub. L. No. 108-25 demands a "policy explicitly opposing prostitution." However, Section 301(f) does not address the root causes of vulnerability that force or lead men and women into sex work. EngenderHealth is morally opposed to condemning the outcome of vulnerability without addressing its root causes. *Inter alia*, these root causes include the failure of nation-states to ratify and fully implement the relevant human rights and protections for women and children articulated in international conventions and agreements, including the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights Of the Child, the Programme of Action adopted at the Fourth World Conference on Women and the Programme of Action adopted at the 1994 International Conference on Population and Development. EngenderHealth's view is that a morally legitimate stance opposing sex work would necessarily entail a full exploration of the root causes of vulnerability, which may lead to a critique of the behaviors of certain nation-states, including the United States. The USAID demand that EngenderHealth sign the certification immediately precludes the necessary exploration of the relevant issues, nor is EngenderHealth prepared to engage in a full exploration and exposition of this complex subject. As a result, USAID is compelling EngenderHealth to articulate a position that we view as intellectually limited and morally suspect.

b. The policy statement demanded by USAID is necessarily a public document. EngenderHealth is concerned that by issuing a public statement it will contribute to further stigmatizing sex workers. Stig-

matizing people perceived as engaging in high risk behavior has been a major contributor to the spread of HIV/AIDS. Stigma has suppressed education and driven people away from services. Sex workers are a very difficult population to reach, precisely because they have been so widely stigmatized. The impact of issuing a policy statement opposing prostitution may be to ally EngenderHealth with the stigmatization of sex workers and their clients. This is not an appropriate posture for a public health organization like EngenderHealth. As a public health organization, our duty is to prevent, mitigate and treat risks to health. This requires adopting a non-judgmental posture with regard to our clients. USAID should not compel EngenderHealth to issue a statement that we believe will contribute to exacerbating stigma.

c. Notwithstanding provisions in the legislation that make USAID funded services available on a non-discriminatory basis, EngenderHealth is concerned that implementation of AAPD 05-04 will have a harmful affect on the scope of programs. EngenderHealth supports a basic package of essential health services, without discrimination against sex workers. Based on long experience, EngenderHealth is highly concerned that USAID Missions, host governments, local organizations and our own staff will avoid developing or supporting innovative programs for sex workers that may be construed as inadequately "anti-prostitution", rather than risk losing USAID funding.

d. AAPD 05-04 serves to chill, if not virtually preclude, legitimate debate on the legal and health regimens governing sex work that most advance public health. Countries have experimented with a wide

range of legal and health approaches to sex work. EngenderHealth's staff, as public health professionals, have the right to objectively examine these various approaches, to assess the evidence on their outcomes and to present recommendations based on the evidence. Public health professionals have the right, indeed obligation, to then advocate for the legal and health strategies they believe most advance public health. The effect of AAPD 05-04 is to forbid the debate. EngenderHealth takes no position as to the legal regimen governing sex work that will most advance public health. However, we assert the right to review the evidence at a time of our own choosing and to draw our own conclusions accordingly, without having the U.S. Government pre-determine our opinions. Section 301(f) and AAPD 05-04 require that our staff censor themselves when making public statements and monitor the issuance of written reports to ensure that all of these representations are sufficiently "opposed to prostitution".

17. Section 301(f) and AAPD 05-04 are so vague that they render EngenderHealth subject to quixotic, capricious and arbitrary denial of funding:

a. Neither definition as to what would constitute an acceptable "explicit policy" nor stipulation of the criteria against which USAID will assess organizational policies are provided. There is no specific guidance from USAID that would help us understand their minimum requirement. It is therefore difficult to know what language or keywords must be in the policy to pass USAID's implicit test. This imposes an unreasonable burden on EngenderHealth to guess as

to what would constitute an acceptable policy statement.

b. AAPD 05-04 requires that EngenderHealth impose the certification requirement on sub-grantees and sub-contractors. It will, in our understanding, be the responsibility of EngenderHealth to monitor sub-grantee and sub-contractor compliance with the certification. However, it is very unclear as to how we are to assess compliance, just as it is unclear as to how USAID will monitor EngenderHealth's compliance. Of particular concern is the implication that we are to monitor the policy statements, writings and speech of partner organizations. This poses an unreasonable burden on EngenderHealth.

c. EngenderHealth is expected to "explicitly oppose" prostitution. Unfortunately, there is no commonly accepted definition of prostitution. No international convention, treaty or law defines the term. Because of the extreme diversity of cultural contexts and circumstances in which transactional sex occurs, it has proven impossible for diplomats and legal scholars to arrive at an agreement. In most countries, prostitution is not outlawed; rather, it is the ancillary activities such as pimping and soliciting that are illegal. EngenderHealth is being asked to oppose an act that remains undefined as a matter of international law and whose definition varies very widely in the countries in which we work. Therefore, its application and enforcement are inherently vague and create an unreasonable burden.

18. EngenderHealth has never had a policy on prostitution in the past. EngenderHealth does not wish to

adopt a policy on prostitution, and believes that it will be harmful to our organization to do so for the reasons given above. EngenderHealth would not adopt such a policy, but for the fact that the U.S. Government has compelled us to do so to continue to obtain USAID funds for our existing HIV/AIDS programs, as well as for new programs.

* * * * *

20. AAPD 05-04 harms EngenderHealth's First Amendment rights by imposing limits on our private, non-federally-funded speech and activities. Because USAID has compelled EngenderHealth to adopt a policy statement, we must ensure that work funded from private or multilateral sources conforms to the new organizational mandate. A principal virtue of receiving private funds is that it permits EngenderHealth to engage in innovative, experimental and potentially controversial programs, as well as to articulate positions on controversial issues, unfettered by the constraints of federal funding. EngenderHealth views its private funds, especially unrestricted gifts, as qualitatively different than federal grants. Private funds allow EngenderHealth to implement programs or express views that the U.S. Government would not support or may oppose. AAPD 05-04 robs EngenderHealth of the possibility of lawfully using private funds to carry out activities or express views with which the Government disagrees.

* * * * *

22. Section 301(f), as interpreted by the Department of Justice, and AAPD 05-04, create a highly threatening precedent. If the U.S. Government's position is upheld, it will have the right to demand that recipient organizations adopt policy statements on virtually any issue. Given the highly controversial nature of reproductive health, as de-

scribed above, this will inevitably lead to a Government-dictated ideology of reproductive health to which private organizations must swear fealty as a condition of carrying out life-saving and humanitarian programs, irrespective of the source of funds. This would fundamentally undermine EngenderHealth's status as an independent, non-governmental organization.

* * * * *

Pursuant to 28 U.S.C. § 1746, I swear or affirm, under penalty of perjury, that the foregoing is true and accurate to the best of my knowledge.

New York, New York
DATED this 12 day of Aug., 2005

/s/ MAURICE I. MIDDLEBERG
MAURICE I. MIDDLEBERG
Acting President
EngenderHealth

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS

[Jan. 25, 2008]

DECLARATION OF PAPE GAYE

I, PAPE GAYE, hereby declare as follows:

1. I am, and have been since August 2004, the President of IntraHealth International, Inc. ("IntraHealth").

* * * * *

3. IntraHealth International Inc. ("IntraHealth") is a nonprofit corporation incorporated under North Carolina law. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 6340 Quadrangle Drive, Suite 200, Chapel Hill, North Carolina 27517. IntraHealth also maintains offices and/or fields project staff in Armenia, Guatemala, Guinea, Eastern Caribbean, Ethiopia, India, Kenya, Le-

sotho, Mali, Namibia, Rwanda, Senegal, South Africa, Southern Sudan, Swaziland, Tanzania, Uganda, Vietnam, and Zambia.

* * * * *

5. IntraHealth's mission is to mobilize local talent to create sustainable and accessible health care. Our vision believes in a world where all people have an equal opportunity for health and well being. IntraHealth pursues this mission and vision by strengthening systems that support health care providers, fostering links among health care providers, clients and communities, improving education and training programs for the health care workforce, and delivering front-line health services and referrals at the community level.

6. IntraHealth has developed considerable expertise in promoting family planning and reproductive health and in combating HIV/AIDS and other sexually transmitted infections. IntraHealth's HIV/AIDS programs train providers in clinical skills, support providers to reach underserved populations with antiretroviral therapy (ART) and other therapies, treatments, and care, promote voluntary HIV counseling and testing, and prevent the mother-to-child transmission of HIV and integrate HIV/AIDS services into family planning and reproductive health services.

7. IntraHealth's annual budget, which in fiscal year 2008 totals approximately $64.7 million, is funded by grants and donations from multiple sources, including Defendants United States Agency for International Development ("USAID") and the United States Centers for Disease Control and Prevention ("CDC"), an operating agency of Defendant Department of Health and Human

Services ("HHS"). IntraHealth also receives contributions from private foundations and individuals. IntraHealth has received funds from multilateral organizations such as the United Nations Population Fund and currently receives funding from the Global Fund and the World Bank.

* * * * *

9. IntraHealth carries out a number of programs funded by Defendants USAID and CDC that are encumbered by restrictions contained in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act").

* * * * *

19. Solely in order to remain eligible to receive U.S. government funding to provide desperately needed HIV/AIDS prevention and care work around the world, IntraHealth in July 2005 adopted a policy opposing prostitution and sex trafficking.

20. DHHS and CDC have required all recipients of Global AIDS Act funding to "agree that HHS may, at any reasonable time, inspect the documents and materials maintained or prepared by the recipient in the usual course of its operations that relate to the organization's compliance [with the policy requirement]." *See, e.g.*, "Expansion and Support of HIV/AIDS/STI/TB Information, Education, Communication and Behavioral Change Communication Activities in Ethiopia—Amendment," 70 Fed. Reg. 29759, 29759-29760 (May 24, 2005), annexed to the Declaration of Daniel E. Pellegrom dated December 7, 2005 as Exhibit A.

21. IntraHealth must comply with the policy requirement as a condition of continuing its CDC-funded programs that include funding made available under the Global AIDS Act. These projects include grants by CDC to strengthen HIV/AIDS services in Southern Sudan, Tanzania, and Zambia.

22. IntraHealth must also comply with the policy requirement as a condition of continuing its USAID-funded programs that include funding made available under the Global AIDS Act. These projects include The Capacity Project, a five-year global initiative to improve health care systems in developing countries, primarily in sub-Saharan Africa. IntraHealth leads The Capacity Project, which develops health care workforce policies and planning, implements education and training programs for health care workforces, and strengthens systems to support workforce performance. The project is currently active in more than 15 countries.

23. IntraHealth leads four other USAID-funded projects that are encumbered by the policy requirement, each one a mission-based cooperative agreement. Two were awarded by the USAID mission in Rwanda and focus on (1) expanding access to health care and decentralization of health care and (2) increasing access to comprehensive HIV/AIDS services; another is a maternal and child health project awarded by the USAID mission in Senegal; and IntraHealth is funded by the USAID mission in India to identify and implement best practices in maternal, child, and newborn health and nutrition.

* * * * *

How the Policy Requirement Harms IntraHealth

26. The policy requirement detrimentally affects IntraHealth in several ways.

27. First, IntraHealth does not normally adopt policies on political or social positions. Rather, it seeks to find solutions to public health challenges based on its experience implementing public health programs and on its organizational purpose, "to create sustainable and accessible health care." IntraHealth has now been forced to espouse a policy position that does not arise from its own purpose, programs and research. It is bound to uphold that policy even though IntraHealth has no knowledge or data to demonstrate whether a policy "explicitly opposing prostitution" does or does not promote the health and well-being of women and vulnerable populations.

28. The second way in which the policy requirement harms IntraHealth is that it makes IntraHealth adopt a judgmental position against a highly marginalized and stigmatized population who is at the epicenter of the HIV/AIDS epidemic and has the least access to health services. IntraHealth trains health workers who must be able to establish trust and rapport with the populations they serve. The policy creates a barrier to establishing this trust and perpetuates the stigmatization and marginalization of an extremely vulnerable population, thereby decreasing access to care and impeding public health efforts to stem the epidemic.

29. The third way in which the policy requirement harms IntraHealth is that it is vague and confusing. IntraHealth believes it is in compliance with the policy requirement; however, the lack of guidance from

USAID, HHS and CDC as to the requirement's meaning leaves the organization unable to discern exactly what the policy requirement demands of us. This lack of clarity engenders an overall atmosphere of caution which effectively restrains our speech and our choice in program direction.

30. Fourth, the policy requirement harms IntraHealth by constricting the privately funded work that it can consider doing. Because of the policy requirement's vast reach in regulating privately funded speech and because of the uncertainty regarding its meaning, IntraHealth will not consider developing any privately funded work that removes barriers to health care for sex workers or vulnerable populations that engage in transactional sex for survival. If the policy requirement were lifted, IntraHealth could act with greater freedom to pursue new projects with non-government funding that are aimed at reducing barriers to health care for sex workers.

31. The fifth way in which the policy requirement harms IntraHealth is that it affects IntraHealth's ability to engage in dialogue about public health and sex work. I and other IntraHealth representatives frequently speak at public health conferences in the U.S. and around the world. Yet, if invited to participate in a public panel discussion about whether decriminalization and de-stigmatization of prostitution could benefit public health interventions to stem the spread of HIV/AIDS, we would not participate in that discussion in order to remain in compliance with the required policy.

32. The sixth way that the policy harms IntraHealth is that the setting up of affiliate organizations is not in line

with IntraHealth's mission to create sustainable and accessible health care. While some US NGOs may use the model of setting up affiliate organizations, IntraHealth works with existing local, indigenous organizations in the countries where we work and builds their capacity in order to create long-term sustainability of public health programs. Moreover, US NGOs who do set up affiliates to support HIV/AIDS work with those engaged in sex work likely receive Global AIDS Act funding and are thus encumbered by the policy.

33. The seventh way that the policy harms IntraHealth is that it is impractical to set up an affiliate organization to use private funds that could support projects that increase access to health services for persons engaged in sex work. The expense and burden of setting up affiliate organizations is prohibitive to IntraHealth as it would be for most similarly situated US NGOs. For example, the process for registering an organization in a foreign country to implement programs is extremely cumbersome and expensive. IntraHealth itself must register in many countries where it has programs in order to open a bank account and implement projects. Registration entails hiring local attorneys, paying registration fees, filling out forms, hiring consultants, traveling to the country, and waiting for months before starting programs. To have to register twice in a country where IntraHealth would need to set up an affiliate to participate in programs that may involve sex workers is too burdensome to be a viable option for the organization. Moreover, it is unlikely that other funders such as the European Union, UK Department for International Development, the Canadian International Development Agency, or private foundations would cover Intra-

Health's costs of for setting up an affiliate just to remain in compliance with a US policy.

34. Finally, the policy harms IntraHealth because an affiliate with completely separate personnel, management, and governance structures will not be able to capitalize on IntraHealth's experience, reputation, and current and prior presence in more than 50 countries across the globe, which is how and why IntraHealth receives its funding. For example, as part of the application process to receive both private and government funding, IntraHealth has to complete corporate capability statements and provide past performance references about our projects that delineate why we are the appropriate organization to implement a particular program. To set up an affiliate organization is to diminish the very strength and position that brings IntraHealth its current work and funding. In other words, a new affiliate organization with separate personnel, management, and governance would be limited in citing IntraHealth's corporate capabilities or past performance references to secure funding for new programs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Jan. 25, 2008
Chapel Hill, North Carolina

/s/ PAPE GAYE
PAPE GAYE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, AND PATHFINDER INTERNATIONAL, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., DEFENDANTS

[Feb. 6, 2008]

DECLARATION OF NILS DAULAIRE

I, NILS DAULAIRE, hereby declare as follows:

1. I am the President and Chief Executive Officer of the Global Health Council ("GHC"). I have held that position since 1998.

* * * * *

7. GHC's mission is to ensure that all who strive for improvement and equity in global health have the information and resources they need to succeed. Essential to fulfilling the GHC's mission as a professional association is our ability to create a safe and inviting space in which GHC members can opine on and debate im-

portant issues of public health, especially issues that are controversial. To that end, the GHC holds, on an almost weekly basis, conferences, forums, briefings, dinners and other events at which GHC members and guests share information, experiences and opinions. As a science-based professional association, GHC's most basic responsibility is to protect the ability of its members to carry out robust debate in the forums provided by GHC. Laws and policies that chill the ability of GHC members to bring evidence and opinion to bear on public health issues therefore inherently vitiate the fundamental rationale for GHC's existence.

8. GHC further realizes its mission by serving as a convener and host for member coalitions focused on specific issues. These coalitions include the Global AIDS Roundtable, the HIV/AIDS Implementers Work Group, the Neglected Tropical Diseases Coalition, the Malaria Roundtable and the Tuberculosis Working Group. GHC also plays an important role in other coalitions, such as the International Family Planning Coalition, the U.S. Child Survival Coalition and the Stop TB Coalition. HIV/AIDS is a prominent topic in most of these coalitions, since its impact is felt in many domains, including opportunistic infections, pediatric AIDS and reproductive health. These forums provide a vehicle for sharing information and coordinating evidence-based advocacy in favor of health policies that will most advance desired health outcomes. The free flow of information within the coalitions is essential to evolving policy recommendations that reflect the field experience and research of the members. GHC and its members engage in dialogue and advocacy with Congress and government agencies, such as Defendant United States Agency for Interna-

tional Development ("USAID"), to inform the government about pressing international health problems and to share evidence as to what policies help or hinder improved health. As the world's largest membership alliance dedicated to improving health throughout the world, GHC has over 30 years of experience informing the public and the government about critical health issues in the developing world and advocating for effective U.S. foreign assistance for health.

* * * * *

11. Many of GHC's U.S.-based members administer programs or provide health care services to people with HIV/AIDS or at high risk of contracting the virus, and more intend to administer such programs in the future. Some of these programs expressly target sex workers or include sex workers within their general scope. Many of the members' programs targeting sex workers have a proven track record in reducing HIV infection and providing treatment to those with the virus and have led to significant advances in understanding the physical, cultural, and socioeconomic underpinnings of the AIDS epidemic. Many of the members administering these programs receive funding to carry out HIV/AIDS work both from defendants and from other, private sources. Some examples of U.S.-based member organizations that receive both government and private funds are: EngenderHealth, *see* Declaration of Maurice Middleberg dated August 12, 2005, ¶ 4; plaintiff Pathfinder International, *see* Declaration of Daniel E. Pellegrom dated February 7, 2008, ¶ 7; CARE, *see* Declaration of Helene Gayle dated February 6, 2008, ¶¶ 3, 8; and IntraHealth, *see* Declaration of Pape Gaye dated January 25, 2008, ¶ 7.

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23. GHC and its members are harmed by the policy requirement in several ways, each of which is discussed in greater detail in the following paragraphs: 1) The policy requirement chills debate in GHC-sponsored meetings and publications and therefore fundamentally undermines GHC's role as a professional association; 2) the policy requirement restricts the use of private funds by GHC's members; 3) the policy requirement compels members to adopt a policy and forces them to speak; and 4) the policy requirement is vague, and as such does not provide sufficient guidance for members to comply.

1. Chilling Debate in GHC-Sponsored Forums

24. GHC does not receive funds from the United States government, including the Global AIDS Act. Yet GHC is grievously harmed by the Act. The Act's deliberate chilling of free speech by our member organizations vitiates our core mission as a scientific and professional organization that promotes the free exchange of evidence, experience, analysis and opinion among our members. The harm to GHC exemplifies the wide-reaching, pernicious consequences of restricting the marketplace of ideas. The government has a hypothesis that criminalization of sex work assists in HIV prevention. The government then adopts the position that contrary evidence or experience gained by organizations actually implementing the Leadership Act may not be communicated in scientific forums organized by their professional association—GHC—or in any other forum even using non-federal funds. Though the GHC is not party to any agreement with the US government, GHC

members receiving Global AIDS Act funds cannot freely communicate their experience, evidence or views to GHC staff. Nor, using non-federal funds, can they communicate freely with fellow GHC members at forums organized by the GHC. Restrictions on speech are dangerous because they deprive the listener as the well as the speaker of the benefit of diverse views. In this instance, GHC is precluded from receiving the honest expression of the field experience of our members, though the GHC receives no funds from the US government.

25. The policy requirement chills and precludes the scientific and policy debate essential to the functioning of the GHC as a professional association. The position of the U.S. government that sex work should be criminalized is hotly contested in the global health profession. There is substantial contrary evidence in the professional literature (*see*, for example, M. L. Reckart, "Sex-Work Harm Reduction," *The Lancet* Vol. 366 (December 17/24/31, 2005): pp. 2123-2134.). The policy requirement also stands in opposition to the views expressed by multilateral organizations, including UNAIDS. Many of our members disagree, as a public health matter, with the view that sex work should be criminalized. Other members do not wish to take a public position on the legal status of sex work. However, the policy requirement bars from federal funding any member organization that fails to support the U.S. government position or presents evidence or experience at a GHC forum that contradicts the U.S. government position. GHC members who, on the basis of evidence and experience, do not agree with the U.S. government position but wish to access U.S. government funds are not permitted to express that view or share relevant evidence at GHC sci-

entific meetings or with GHC staff. This is a fundamental harm to the GHC, which depends on the free flow of evidence and opinion among its members to carry out its mission. This harm can only be redressed by protecting all our members from fear of retaliation for expressing their views at GHC scientific meetings and other forums.

26. The GHC manages multiple electronic and print publications, including a weekly newsletter, monthly newsletter, a magazine (Global HealthLink) and a newspaper (AIDSLink, which is devoted exclusively to HIV/AIDS). These publications are principally intended as an outlet for expression of member news, experience and opinion. The policy requirement precludes members from expressing a point of view contradicting that of the U.S. government in GHC publications for fear of being barred from federal HIV/AIDS funds. The chilling effect of the policy requirement on the expression of member viewpoints on AIDS policy in GHC publications is a direct harm to GHC. Redress of this harm requires that all our members be granted immunity against being disbarred from U.S. government funds as a result of expressing opinion in GHC publications.

2. **Restricting the Use of Members' Private Funds**

27. The policy requirement vitiates members' freedom to utilize private funds in the way they believe best advances public health. The Defendants' ban on the use of the non-U.S. government funds possessed by GHC members to do work that Defendants construe as being insufficiently opposed to prostitution restricts members from engaging in speech and HIV-prevention activities with their private funds. The vagueness of the policy

requirement, and Defendants' refusal to clarify what private activities grantees must abstain from, forces GHC's members to refrain from engaging in any activities that could possibly be construed as insufficiently opposed to prostitution. For this reason, U.S.-based GHC members have reported to GHC a pattern of self-censorship and reluctance to discuss programs for sex workers in public or for attribution.

* * * * *

3. Compelling Speech

31. The third way in which GHC and its members are harmed by the policy requirement is that it forces the members to espouse the U.S. government's policy position on a sensitive political issue. While the U.S. government clearly believes that criminalizing prostitution is the best and only way to protect women and sexual health, as a public health matter that point of view is disputed by many in the global health profession.

32. Many of GHC's U.S.-based members believe that prostitution causes serious health, psychological and physical risks for women, and they work to address those risks and assist women in finding alternatives. However, they also believe that by forcing the members to explicitly oppose prostitution, the policy requirement stigmatizes one of the very groups whose trust they must earn to conduct effective HIV/AIDS prevention and forces them to approach those engaged in prostitution in a judgmental manner. As a public health matter, they believe that this interferes with their HIV/AIDS prevention work.

33. Moreover, many U.S.-based members are aware that Defendants have construed the policy requirement

as prohibiting advocacy for the elimination of criminal penalties against women engaged in prostitution. Because GHC members operate under a variety of legal regimes around the world, many members are loathe to adopt a policy that directly contradicts the policy of some of the countries in which they work.

34. Were it not for the policy requirement, many of GHC's U.S.-based member organizations would not have adopted policies explicitly opposing prostitution. These include the organizations that stated in response to our member survey that they oppose the policy requirement. It is common practice in the field of international development to refrain from taking policy positions unless those positions flow naturally from the experience of providing services. For GHC's members, the adoption of a government-mandated, organization-wide policy infringes on the independence that is fundamental to their operation as non-governmental organizations.

35. For example, U.S.-based GHC member EngenderHealth has articulated a concern that being forced to adopt the government's policy may jeopardize its work in Brazil. *See* Declaration of Maurice Middleberg dated August 12, 2005, ¶ 15. Because the area of reproductive health is so sensitive, EngenderHealth risks alienating some funders or partners in its work by taking any policy position on the issue of prostitution, which in turn risks threatening the effectiveness of their HIV/AIDS prevention work.

4. Vagueness

36. The final way in which GHC and its members are harmed is that the policy requirement is confusing and vague and therefore imposes extra administrative costs.

Many U.S.-based members are unsure of what activities and speech they may and may not engage in with private funds. Members have reported that USAID missions have been inconsistent in applying the language of the policy requirement. Some members have reported that local USAID missions in countries in which they operate have demanded to see an organization's policy opposing prostitution while others have reported that missions did not demand to see the policy. Some members have reported that, in the absence of guidance from the Defendants, primary recipients of U.S. government funds have inserted their own language in subcontracts about what constitutes compliance with the policy requirement.

37. One U.S.-based GHC member had to spend months of scarce staff time and resources in discussion with USAID to reinstate a grant after it had been withdrawn under pressure from U.S. legislators. Because the requirements of the policy are vague, USAID was able to withdraw and reinstate the grant according to political pressure, forcing our members to commit scarce resources to allay the political fears of USAID.

38. Another U.S.-based GHC member was forced by the local USAID mission to commit scarce resources to training local service providers to comply with the policy requirement.

The Affiliate Guidelines Do Not Remedy the Harm to GHC And Its Members

39. USAID and HHS have issued guidelines with regard to the establishment of "affiliated" organizations that could express an opinion on sex work different from the U.S. government-mandated opinion. Such affiliated

organizations must be legally, physically, and financially separate. Factors used in determining whether the affiliate is separate from the entity receiving Leadership Act funds include the existence of separate personnel, management, and governance; separate accounts, accounting records, and timekeeping records; separate facilities, equipment and supplies; distinct signs and other forms of identification which distinguish the Recipient from the affiliated organization; and "protecting" the U.S. Government and the project name from public association with the affiliated organization. The guidelines caution that meeting these conditions would not necessarily constitute compliance with the Leadership Act, but that each instance would be considered on case by case basis.

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43. The guidelines do not provide clear criteria for the creation of an affiliated organization. They quite clearly caution that an organization meeting all the criteria and factors could still be considered out of compliance and fail to meet some unstated "case by case" test. The guidelines also fail to explain how much weight will be given to each factor in the analysis of whether an affiliate is in compliance. Most importantly, the guidelines fail to achieve their essential purpose; they make no effort to clarify the vague prohibition from the original law and, in fact, only make the contours of that prohibition more unclear.

44. Significantly, the guidelines appear to bar GHC's members from controlling any organization that uses private funds to engage in speech barred by the policy requirement. One of the five criteria to be taken into account in determining whether enough separation ex-

ists is "[t]he existence of separate personnel, management, and governance." This criterion appears to bar our members from using their private money to engage in the forbidden speech through another organization. In this way, the guidelines fail to provide our members with an avenue for constitutionally protected speech.

45. Even if a GHC member were able to transfer its private funds to an affiliate, and to use those funds to speak through that affiliate, doing so would be logistically and financially difficult, and perhaps impossible. In order for a GHC member to speak freely with its private funds, it would have to create an affiliate organization in every country in which it operates. Creating affiliates that will maintain the legal, financial, and physical separation from the parent organizations that the guidelines require will present very heavy burdens on GHC's member organizations. Even if GHC members were to limit their creation of affiliates just to those countries in which they might express an opinion differing from the U.S. government view on sex work, the requirements would still be heavily burdensome. These burdens virtually preclude any member from actually developing an affiliate as demanded by the government.

46. The legal separation mandated by the guidelines imposes heavy costs on GHC' s member organizations in terms of time, effort, and money. In many of the developing countries where GHC's member organizations operate, starting a new NGO is a complex and arduous process. The NGO must secure the approval of the local government to register, which typically involves complex negotiations with multiple ministries. That process takes a great deal of time by the NGO's employees and requires the help of attorneys, whose fees the NGO

must pay. Moreover, it is far from a foregone conclusion that the governments of developing countries will approve the registration of affiliates whose only purpose is to satisfy a US government requirement for expressing a point of view.

47. Even if the registration of the affiliate is approved, it is likely to be very difficult to staff the new entity with the separate personnel required by the guidelines. If the new affiliate tries to hire citizens of the United States or of a third country, it will have difficulty securing visas and work permits. The governments of developing countries grant such authorization to secure essential expertise, not to import persons whose job is necessitated by restrictions on the advocacy functions of existing organizations. Local employees are hard to find in many countries either because the requisite skills will not be available or because national staff feel vulnerable to political and other pressures if they espouse unpopular points of view.

48. Our members will also incur enormous costs recruiting and employing a second, redundant set of employees. It is extremely expensive for our members to hire expatriates or third country nationals to staff their offices. In the case of expatriate employees, members generally pay for such expenses as each employee's moving and housing costs, their children's education, and bringing the family home for visits.

49. Establishing and operating a physically separate office will also be extremely expensive for our members, who must pay for security, office equipment, furnishings and other items for each office. Additionally, in some developing countries where GHC members operate,

technological equipment such as computers, printers, satellites, and networking supplies must be imported. This is not only expensive, but requires the members to work through detailed local customs laws for a second time. It also requires paying for computer set-up and operation (often including installing the necessary wiring and satellite dishes) in a second office.

50. Another difficulty created by the guidelines is the requirement that the board of directors of the parent NGO be entirely separate from the board of the affiliate. Boards of Directors are the final authority over and control GHC member organizations. The affiliates, then, would also be controlled by their separate and independent boards. If the premise behind the creation of the affiliate is to create a way for the parent to speak its intended message through another source, this requirement runs counter to the achievement of that ostensible goal. The affiliate having a separate board will make it impossible for the parent NGO to have control over the affiliate and thus control over the message coming from that affiliate. This requirement, then, could again leave the parent NGO with no outlet for its intended message.

51. The financial separation mandated by the guidelines is equally onerous for members. Since no commingling of funds is allowed between the parent organization and the affiliate, the affiliate would be required to raise all its own funds, starting from nothing. This is a difficult and time consuming process. Fund raising is already extremely challenging for GHC members. The new affiliates would have to allocate valuable man-power and resources towards fund raising and away from achieving the organizations' objectives. The affiliates would have to convince potential donors to give money

before the organization has a track record of work to showcase to potential donors. To raise requisite funds, it is very likely that the affiliate will need to draw on the pre-existing donor pool of the parent NGO. Since there is only a finite amount of money donors are willing to give to NGOs, this will deprive the parent organization of much needed funds.

52. The legal, governance, and financial challenges pose an insuperable burden for our members. The practical consequence will be to bar GHC members from expressing a point of view through any organizational vehicle. The Government proposes that a non-profit organization divert scarce resources from their primary mission of addressing the HIV/AIDS pandemic and other critical health and poverty alleviation programs to rent or buy facilities, hire a separate staff, create an independent Board, develop separate accounting systems, and create a new, distinct identity so that it may express an opinion on an issue of public policy. Even undertaking all these actions may not suffice given the ambiguity of the case-by-case test in the guidelines. The government has created an extremely high and unreasonable hurdle for organizations to surmount.

53. Even if the legal, governance and financial hurdles could be surmounted, the creation of an affiliate divorced from the rest of the existing organization's program implementation undercuts its utility as an advocate of a point of view. To the extent that groups would have to cordon off sex work advocacy from other programs it would force NGOs to have an artificial separation between advocating policy positions and the practical experience of implementing programs from which their policy positions derive. The utility of NGOs in the

policy arena stems largely from their unique vantage point. The positions they advocate come from experience gained on the ground and from their understanding of the true consequences of policies formulated in far away capitals. A forced dichotomy between the NGOs that implement and those that advocate undermines the utility of our members as bridges between policy makers and the complex realities encountered while implementing programs.

54. More fundamentally, the affiliate guidelines in no way alleviate the central harm to the Global Health Council. As stated above, the very rationale for the existence of the GHC as a professional organization is to create forums at which our members may come and freely share opinions based on the evidence and experience derived from their work. We emphasize that this means the work of the organizations actually implementing the HIV/AIDS programs, not some arms-length affiliate that does not have the same governance, management, staff, expertise or evidence as those actually implementing programs. GHC is, above all, a place at which organizations that implement programs share the reality that they encounter in the field, including how public policy affects program implementation. The anti-prostitution policy requirement prevents those implementing the HIV/AIDS Leadership Act from providing informed comment to each other and to the GHC as to the assumptions and impacts of the Act. For example, GHC is soon hosting its annual conference. There, Pathfinder will have a poster session—a booth with information and a staffer to speak with—called "Condoms and Health Care: Sex Workers Need More." Pathfinder can speak freely at the event because they have the pro-

tection of the injunction, but other conference attendees would not be able to have poster sessions that engage interested parties in a free and open exchange of ideas on sex work for fear of violating the policy requirement. The GHC is therefore robbed of its ability to encourage informed dialogue among its members. The GHC is prohibited from hearing the views of the members implementing the Global AIDS Act if those views differ from the government-approved opinion. Any member receiving Global AIDS Act funds risks losing those funds by communicating a dissenting opinion to the GHC or at a GHC-sponsored forum. This means that the GHC cannot offer Congress or the executive branch an accurate rendering of the experience and evidence derived from its members if they differ from government-sanctioned opinion. The creation of "affiliates" does not address these fundamental damages to the GHC since we are still barred from hearing the untrammeled views of our members.

* * * * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 6, 2008
Washington, District of Columbia

/s/ NILS DAULAIRE
NILS DAULAIRE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05-CV-8209 (VM)(DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, AND PATHFINDER INTERNATIONAL, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., DEFENDANTS

[Feb. 6, 2008]

DECLARATION OF HELENE GAYLE

I, Helene Gayle, hereby declare as follows:

1) I am President and Chief Executive Officer of Cooperative for Assistance and Relief Everywhere, Inc. ("CARE").

* * * * *

3) CARE is a non-profit cooperative association incorporated as the Cooperative for Assistance and Relief Everywhere, Inc. under the laws of the District of Columbia. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 151 Ellis Street, NE, Atlanta, Georgia 30303. CARE also has an office at 32 West 39th Street,

3rd Floor, New York, New York 10018 where it raised over five million dollars in private funding last year. CARE is a member of CARE International ("CI"), a federation of 12 other CARE nonprofit members incorporated separately in Australia, Austria, Belgium, Canada, Denmark, France, Germany, Japan, the Netherlands, Norway, Thailand and the United Kingdom.

4) CARE is a member of InterAction, a network of U.S.-based humanitarian organizations. Membership in InterAction enables CARE to advance its mission and goals through collaboration and advocacy with other organizations that also seek to eliminate poverty and improve the quality of life for people in developing countries. CARE is also a member of the Global Health Council, through which it advances its interest in the promotion of sound international public health policy and practice.

* * * * *

6) In its last fiscal year (FY 06), CARE projects reached 55 million people in 66 countries throughout Africa, Latin America, Asia, Europe and the Near East. CARE accomplishes its mission by working closely with local nongovernmental organizations, host country governments, governmental and private donors, other CI members, health care providers and individuals in the communities it serves. Among its programs, CARE provides quality family planning and reproductive health services, and works to halt the spread of HIV and improve maternal and child health.

7) Last year, CARE expended $590 million toward its work overseas, funded by grants and donations from sources including Defendants United States Agency for

International Development ("USAID") and the United States Centers for Disease Control and Prevention ("CDC"), an operating agency of Defendant Department of Health and Human Services ("HHS"). CARE also receives funds from agencies of the United Nations, European Union, foreign governments, and the World Bank, and numerous foundations, corporations and individual donors.

The Global AIDS Act Restrictions

8) CARE carries out a number of programs funded by Defendants USAID and CDC that are encumbered by restrictions contained in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act").

* * * * *

15) CARE must comply with the policy requirement as a condition of engaging in programs overseen by USAID and the CDC that draw HIV funding authorized by the Global AIDS Act. These programs include assistance to orphans and vulnerable children, prevention of mother-to-child transmission of HIV, and capacity building to train indigenous nonprofits to implement HIV and AIDS programs. CARE receives Global AIDS Act funding for numerous projects including Strengthening and scaling up of the Hope for African Children Initiative in Africa ("SSUH"), a project to provide services to children affected by and/or infected with HIV in Ethiopia, Zambia, Senegal, Ghana, Cameroon, Kenya, Mozambique, Malawi and Uganda; Local Links, a project that assists orphans and vulnerable children in Kenya and South Africa; and two Associate Awards under the Communities Responding to the HIV/AIDS Epidemic

("CORE") Initiative. CARE also conducts privately funded HIV and AIDS initiatives several countries including India, Rwanda, Burundi, Lesotho, Mozambique, Bangladesh, and Mali.

16) Solely in order to comply with the policy requirement and to remain eligible to receive U.S. government HIV funding to provide desperately needed HIV prevention, care and treatment work around the world, CARE adopted a Policy on Working with Vulnerable People Involved in Prostitution and Sex Trafficking. Were it not for the requirement in the Global AIDS Act, CARE would not have adopted a policy addressing prostitution.

How the Policy Requirement Harms CARE

17) The policy requirement harms CARE by covering activity not funded by the U.S. government. Although CARE's USAID and CDC funding is limited, CARE's HIV and AIDS work with private, non-US government, funding is also affected by the policy requirement. If an overly broad construction of the policy requirement were adopted, Defendants may construe CARE's non-U.S. Government funded activities as being insufficiently opposed to sex work. CARE believes that it is complying with the policy requirement, but it does not know whether Defendants USAID, HHS and CDC agree.

18) For example, the policy requirement threatens CARE's privately funded HIV prevention work with sex worker organizations and networks. Based on years of responding to the onslaught of HIV and AIDS on the most vulnerable groups, including sex workers, CARE has learned that mobilizing community groups and building collective strength is often the most effective

and sustainable way to fight HIV over the long-term in high-risk communities. Individually, sex workers have little leverage to turn society's riskiest practices toward safer sex. Collectively, networks of sex workers can be empowered to influence those most at risk toward preventive behaviors.

19) With private funding, CARE helps develop these sex worker organizations, in Bangladesh and India, for example, with the purpose of achieving more effective HIV prevention outcomes. While CARE believes that this approach complies with the policy requirement, it fears that defendants USAID, HHS and CDC may construe the policy requirement overly broadly and penalize CARE for the independent views of sex worker organizations with which it works.

20) CARE's privately funded work with sex worker organizations was questioned by former Rep. Mark Souder in a letter dated December 7, 2005 to the Hon. Andrew Natsios, then-Administrator of USAID. In the letter, Rep. Souder used CARE's privately funded tuberculosis prevention work with the Durbar Mahila Samanwaya Committee ("DMSC") to impute the views of DMSC to CARE. He then asserted that CARE's association with DMSC constitutes a violation of the policy requirement. The vagueness of the policy requirement harms CARE because it makes possible such false allegations that can do considerable harm to CARE's reputation.

21) On or about June 23, 2006, USAID officers contacted CARE's senior managers in India and Bangladesh to inquire about CARE's relationship with DMSC which received only private funding from CARE and

was not connected with CARE's USAID- or CDC-funded HIV and AIDS work.

22) In August 2006, USAID's Acting General Counsel sent CARE a letter asking it to respond to allegations regarding CARE's privately funded work with sex worker groups in India and Bangladesh. CARE responded to the request but remains concerned that it is at risk of continued intrusive and unwarranted governmental investigations regarding whether CARE is engaged in activities that government investigators may construe as insufficiently opposed to prostitution.

23) CARE considers it essential to work with vulnerable populations, including sex workers, to combat the spread of HIV. CARE expends great effort to gain the trust of these individuals in order to educate individuals at high risk of contracting HIV about the prevention and treatment of HIV. In Bangladesh, for example, CARE has been recognized by UNAIDS and the World Health Organization as a best practices leader for its work in identifying effective prevention strategies that involve sex workers as peer educators. In CARE's experience, explicitly adopting a written policy that opposes prostitution may be viewed by this vulnerable group, sex workers, as contrary to their interests and could undermine their trust in CARE and hamper CARE's efforts to educate this vulnerable population about HIV and AIDS. The policy requirement harms CARE because it compels CARE to speak where CARE would otherwise have remained silent.

24) CARE is a prominent advocate of humanitarian best practices that regularly hosts and engages in vibrant discussion and debate on topics integral to HIV

and AIDS ranging from best practices aimed prevent HIV transmission within high-risk groups, to reducing stigma, and empowering women and girls. These strategies have been shown to be effective in reducing HIV transmission in targeted communities. However, out of caution and uncertainty, CARE has restricted its media and public communication to raise awareness of its work in India and Bangladesh, and has often declined to share what it has learned regarding HIV prevention strategies at conferences both in the United States, including New York, and abroad.

25) The policy requirement also harms CARE in that it affects CARE's active, privately funded advocacy programs, both within the United States and within the countries and communities where CARE works overseas. CARE actively seeks to improve the U.S. and global policy environments to support effective international family planning, reproductive health and HIV programs. CARE accomplishes this by educating policy-makers and the general public about conditions facing women and their families in developing countries and the impact of laws and policies on the delivery of services related to family planning and HIV prevention, care and treatment. CARE must ensure that any advocacy it undertakes conforms to the policy requirement. CARE fears that it may seem to violate the policy requirement if it broadly discusses alternative approaches to HIV prevention among high-risk groups, either in the United States or abroad, because it is not clear which advocacy approaches are perceived by the Defendants as compliant. The concern is that the advocacy itself may be seen to violate the policy, even if CARE's overseas program activities do not. Thus, although CARE

believes itself to be in compliance with the U.S. government policy, the effect of the policy requirement is to inhibit substantially open discourse regarding innovative and effective approaches to reduce the spread of HIV infection among high-risk groups.

26) Finally, a basic and explicit tenet of CARE's work in humanitarian assistance and disaster relief is grounded in its efforts to aid exploited, disenfranchised, or marginalized people without conveying a message of condemnation or disrespect. CARE's core values are strongly grounded in an ethical commitment to ensure that it stands with, and not above, the individuals it serves. The policy requirement harms CARE by compelling it to speak in a manner that is inconsistent with its mission and its core values. In exercising its right to use its private funds to speak and advocate on behalf of the world's poorest people, CARE should not be constrained the judgmental approach adopted by the U.S. government.

Why the new guidelines are burdensome to CARE

* * * * *

29) The guidelines are burdensome because (1) the guidelines are vague; (2) their vagueness makes implementation impractical for a non-profit organization like CARE; and (3) even if CARE could abide by the guidelines, this would do not resolve CARE's concern about the harms generated by the policy requirement .

30) The guidelines are vague because they offer no guidance as to what activities would be considered inconsistent with a policy opposing prostitution and sex trafficking or "restricted activities". Based on its years of field experience responding to the onslaught of HIV

and AIDS on the most vulnerable groups, including sex workers, CARE seeks to implement an integrated and holistic set of interventions designed to be most effective and sustainable to fight HIV and AIDS over the long-term in high-risk groups. Under these guidelines, CARE is unable to determine which interventions might be considered "restricted activities" required to be conducted by an affiliate. CARE is concerned that arbitrary parsing of activities and bifurcation of interventions designed to work as an integrated whole would reduce CARE's ability to implement effective HIV programs among the most vulnerable groups.

31) The vagueness of the five factor physical and financial separation test in the third requirement of the guidelines make creation of an affiliate financially impracticable for a non-profit organization like CARE. The guidelines provide that the agencies will determine sufficient physical and financial separation "on a case-by-case basis...based on the totality of the facts"; that "presence or absence of any one or more factors will not be determinative"; and that factors relevant to the determination "shall include but will not be limited to" the five factors. In addition, three of the five factors are qualified by the phrases "degree of separation" and "the extent to which". Given this, if CARE were to create an affiliate, it would be impossible for CARE to accurately predict how the agencies would evaluate physical and financial separation of the entity. Prudence would require that such an affiliate meet all elements of each factor in the guidelines. However, expending CARE's limited resources to create, fund, operate and maintain a separate legal entity with separate personnel, separate management, separate governance, separate accounts,

separate accounting records, separate time keeping records, separate facilities, separate equipment, separate supplies and separate signs and forms of identification solely in order to be able to carry out a likely narrow but undetermined list of activities would be impractical in light of CARE's obligation as a non-profit organization to carefully and responsibly steward financial resources entrusted to it by donors.

32) In addition, the guidelines are impractical in the context of CARE's international organizational structure. CARE coordinate operations on behalf of CI in the following countries: Burundi, Democratic Republic of Congo, Eritrea, Ethiopia, Rwanda, Somalia, Sudan, Tanzania, Uganda, Angola, Benin, Ghana, Ivory Coast, Lesotho, Madagascar, Malawi, Mali, Mozambique, Niger, Sierra Leone, South Africa, Togo, Afghanistan, Bangladesh, India, Nepal, Pakistan, Philippines, Sri Lanka, Tajikistan, Bolivia, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua and Peru. In many countries, CARE operates through registered branch offices and CARE conducts privately funded programs through all of its branch offices. In order to be able carry out activities overseas, a CARE affiliate may also be required to register branch offices. The process of obtaining host government approval and clearance to establish operations and carry out programming in a country can be lengthy, complicated and fraught with bureaucratic hurdles.

33) In one of the countries in which CARE operates, the law governing foreign NGOs has changed twice since 2005, requiring all foreign NGOs to re-register with relevant ministries. For CARE, the first re-registration

effort took about nine months to complete, while the second took about four months.

34) CARE's presence in many of the countries where it works is based on agreements with host governments negotiated decades ago. In some countries, host governments are actively seeking to nurture and promote the growth of indigenous NGOs, limiting the space in which foreign NGOs can operate. If it were required to obtain, from over 35 individual host governments, permission for a CARE affiliate to operate within their borders, the sheer volume of time and resources necessary to do this would likely make the proposition prohibitive for CARE.

35) Even if a CARE affiliate were able to obtain the necessary permissions, in order to maintain physical and financial separateness prescribed in the guidelines, country offices of the affiliate would likely have to maintain separate personnel, separate management, separate governance, separate accounts, separate accounting records, separate time keeping records, separate facilities, separate equipment, separate supplies and separate signs and forms of identification from the CARE offices already operating in those countries. The process of establishing country office operations is akin to opening a small business and includes, among other things, locating and leasing office space, recruiting and hiring local staff, obtaining work permits for international staff if necessary, obtaining bank accounts, obtaining import licenses for any number of items, ranging from computers to cars. The level of resources required to create, fund, operate and maintain a duplicate set of offices would likely make the affiliate option unviable for CARE.

36) The requirement to maintain separate signs and forms of identification suggests that an affiliate may not even be able to use the CARE name and brand. CARE's vast poverty fighting experience and reputation are inherent in its name and brand, and is a key to attracting donor funding for its work. If the affiliate is unable leverage CARE's goodwill and reputation, it is unclear how a new and unknown organization would be able to attract the type of donor funding necessary to develop effective and sustainable programs.

37) As a cooperative association organized under the laws of Washington D.C., CARE is governed by a Board of Overseers that also acts as its Board of Directors. Because the guidelines require an affiliate to have separate governance and separate management from CARE, it is unclear what type of control, if any, CARE would be able to assert over such an entity. If the objective of these guidelines is to un-encumber organizations like CARE from the burdens on speech imposed by the policy requirement by offering an alternative route through which they might speak, the degree of separation described in the guidelines do not appear to offer CARE a viable alternative route. It is unclear that members of the general public would even be able to discern a relationship between CARE and an affiliate created under these guidelines.

38) Finally, the guidance adopted by USAID and HHS in July 2007 does not absolve CARE of the requirement to adopt a policy explicitly opposing prostitution. CARE is still being compelled to speak where CARE would otherwise have remained silent.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 6, 2008
In Atlanta, Georgia

/s/ HELENE GAYLE
HELENE GAYLE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05-CV-8209 (VM) (DF)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., DEFENDANTS

[Feb. 7, 2008]

DECLARATION OF DANIEL E. PELLEGROM

I, DANIEL E. PELLEGROM, hereby declare as follows:

1. I am, and have been since 1984, the President of Pathfinder International ("Pathfinder").

* * * * *

3. Pathfinder is a non-profit corporation incorporated under District of Columbia law. It enjoys tax-exempt status under section 501(c)(3) of the Internal Revenue Code. Its primary office is located at 9 Galen Street, Suite 217, Watertown, Massachusetts 02472-4501.

4. Pathfinder was founded in 1957 by Dr. Clarence J. Gamble, a private philanthropist, and it was one of the first U.S.-based organizations to address international population issues. Pathfinder's mission is to provide access to quality family planning and reproductive health services to women, men, and adolescents throughout the developing world. In addition to its family planning work, Pathfinder also works to halt the spread of HIV/AIDS, improve maternal and child health, and prevent unsafe abortions. It accomplishes these goals by developing partnerships with local non-governmental organizations, host country governments, the private sector, and health care providers. Pathfinder's governing philosophy is to provide this assistance with concern for human rights, for the status and role of women, and from the perspective of the clients it serves.

5. Pathfinder operates in the following 27 countries: Angola, Bangladesh, Bolivia, Botswana, Brazil, Burundi, Colombia, Ecuador, Egypt, Ethiopia, Ghana, Guatemala, Guinea, India, Kenya, Moldova, Mozambique, Nepal, Nigeria, Papua New Guinea, Peru, South Africa, Southern Sudan, Tanzania, Uganda, Vietnam, and Yemen.

* * * * *

7. Pathfinder's annual budget, which for fiscal year 2008 totals $89 million, is funded by grants and donations from multiple sources, including Defendants United States Agency for International Development ("USAID") and the United States Centers for Disease Control and Prevention ("CDC"), an operating agency of Defendant Department of Health and Human Services ("HHS"). Pathfinder also receives funds from several agencies of the United Nations, the Swedish, Canadian,

and Dutch governments, the World Bank, and numerous foundations, corporations and individual donors.

8. In the following 18 countries, Pathfinder receives funding from sources other than the US government to operate projects that do not receive any Global AIDS Act funding: Angola, Bangladesh, Bolivia, Brazil, Colombia, Ecuador, Ghana, India, Kenya, Mozambique, Nigeria, Papua New Guinea, Peru, South Africa, Southern Sudan, Tanzania, Uganda and Vietnam.

II. The Global AIDS Act Restrictions

9. Pathfinder carries out a number of programs funded by Defendants USAID and CDC that are encumbered by restrictions contained in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Global AIDS Act").

* * * * *

19. Pathfinder must comply with the policy requirement, as modified by the guidelines, as a condition of continuing its USAID-funded programs that include HIV/AIDS components. Among these programs are one project to increase the use of child survival and reproductive health services in Mozambique and another to extend service delivery for reproductive health services globally.

20. Pathfinder must also comply with the policy requirement as a condition of subcontracts it holds with other development organizations to carry out USAID-funded work, for example a program to improve HIV-AIDS policies in Nigeria.

21. Pathfinder also must comply with the policy requirement as a condition of continuing its CDC-funded

work to implement a program to prevent mother-to-child HIV transmission in Kenya, to expand home-based care programs for HIV-positive persons in Tanzania, and to expand psychosocial and peer counseling services in Botswana.

III. Pathfinder's Policy

22. Solely in order to comply with the policy requirement, and to remain eligible to receive U.S. government funding to provide desperately needed HIV/AIDS prevention and care work around the world, in July 2005, Pathfinder adopted the following policy:

> In order to be eligible for federal funding for HIV/AIDS, Pathfinder opposes prostitution and sex trafficking because of the harm they cause primarily to women. Pathfinder's HIV/AIDS programs seek to promote effective ways to prevent the transmission of HIV/AIDS and to reduce the suffering caused by HIV/AIDS. In order to achieve these goals, Pathfinder works with, and provides assistance and support to and for, many vulnerable groups, including women who are commercial sex workers, who, if not effectively reached by HIV/AIDS programs, will suffer and can become drivers of the HIV/AIDS epidemic.

IV. How the Policy Requirement Harms Pathfinder

23. The pledge requirement hurts Pathfinder and the clients it serves, both by compelling Pathfinder to espouse the government's point of view and by limiting Pathfinder's speech and activities.

A. Compelling Speech and Mandating Viewpoint

24. Pathfinder has been forced to stake out a policy position on an issue on which it wished to remain neutral at this time. As an international development organization operating in multiple countries, each with its own set of laws and cultures, Pathfinder is mindful of the need to refrain from taking policy positions without careful study and deliberation. With the exception of the anti-prostitution policy it adopted to comply with the policy requirement, Pathfinder's policy positions have been formed only after deeply studying an issue, primarily by examining its own experience promoting access to health care in the developing world. Were it not for the mandate in the Global AIDS Act, Pathfinder would not have adopted its anti-prostitution policy.

25. Moreover, because the policy requirement is vague and confusing, Pathfinder has no way of knowing whether the policy it has adopted complies with the requirement. To my knowledge, neither the Global AIDS Act nor any of the Defendants has defined what it means to have a policy "explicitly opposing prostitution." I do not know what Defendants mean by this phrase.

26. Pathfinder believes its policy does comply with the policy requirement. However, given the lack of guidance from USAID, HHS, and CDC as to the requirement's meaning, Pathfinder fears that if the preliminary injunction is lifted Defendants USAID, HHS, and CDC will apply an overly broad interpretation of the policy requirement to Pathfinder's policy and find Pathfinder out of compliance with the policy requirement.

27. The guidance adopted by Defendants USAID and HHS in July 2007 does not absolve Pathfinder of the re-

quirement that it adopt a policy "explicitly opposing prostitution." Although it permits Pathfinder to transfer private funds to a legally, financially, and physically separate entity over which Pathfinder exercises no control, which can then engage in activities that would otherwise run afoul of the policy requirement, Pathfinder itself continues to remain obligated to maintain a policy "explicitly opposing prostitution" so long as it accepts any Global AIDS Act funds from Defendants.

28. That policy necessarily governs not only Pathfinder's use of federal funds, but also the entire Pathfinder entity. Pathfinder must get funds from sources other than Defendants, because Defendants require it to do so to be eligible even to apply for funding. For example, a USAID regulation requires U.S.-based NGOs such as Pathfinder to "solicit[ ] and receive[ ] cash contributions from the U.S. general public" in order to be eligible to receive certain USAID funding. *See.* 22 C.F.R. § 203.3(b) (organization may register as a U.S. private and voluntary organization, a requirement for many cooperative agreement grants, only if it raises funds from the U.S. public). USAID requires that fully 20 percent of the support for Pathfinder's international work come from non-US government sources. *See* USAID, Frequently Asked Questions, *available at* http://www.usaid.gov/pubs/sourcebook/usgov/faqs.html (accessed Jan. 4, 2008), attached hereto as Exhibit A. The policy requirement dictates how these private funds can and cannot be used.

B. Limiting Pathfinder's Speech and Activities

29. Pathfinder engages in a significant amount of activity not funded by the U.S. government that could be

affected by an overly broad construction of the policy requirement. Currently, this Court's preliminary injunction allows Pathfinder to conduct this work. Pathfinder believes that even if the preliminary injunction is lifted, a proper interpretation of the policy requirement would permit it to continue engaging in this work. However, because the policy requirement itself uses vague and confusing language, and because Defendants have refused to clarify what it means, Pathfinder does not know whether Defendants USAID, HHS, and CDC agree that all of Pathfinder's work is permissible under the policy requirement. Consequently, if the preliminary injunction is lifted, I will need to ensure that Pathfinder refrains from engaging in any activities that could possibly be construed as insufficiently opposed to prostitution, even if Pathfinder itself does not view the activities that way.

1) Work with vulnerable populations

30. One category of activities Pathfinder engages in that might be barred by an overly broad construction of the policy requirement concerns Pathfinder's HIV/AIDS prevention work aimed at vulnerable populations, including sex workers. In Brazil, India, and Mozambique, Pathfinder currently uses funding solely from sources other than the U.S. government to prevent the spread of HIV among vulnerable groups including sex workers. In the past, it has run similar programs in Nigeria. One strategy that Pathfinder has found to be highly effective is to organize sex workers and to work cooperatively with existing sex worker organizations to promote their health and human rights. Pathfinder engages in this work because, like most international development organizations, it works with local groups, including organi-

zations composed of sex workers, to identify their needs and priorities and then to achieve the goals they have identified within the international framework of their right to health.

a) India

31. For example, Pathfinder's privately funded Mukta program in India seeks to organize sex workers so that they will collectively agree to engage in HIV prevention methods, such as using condoms. While Pathfinder believes that its organizing of sex workers in India complies with the policy requirement, it fears that Defendants USAID, HHS, and CDC may construe the policy requirement in an overly broad manner and subject Pathfinder to penalties should sex worker organizations it has fostered or cooperated with then pursue goals that Defendants view as inconsistent with opposition to prostitution.

32. In March 2007, Mukta held a convening that brought together more than 1,800 sex workers from Maharashtra to discuss rights, empowerment, and HIV/AIDS prevention. Among the topics the attendees discussed were the human rights of sex workers and their interactions with the police and other government officials. If the preliminary injunction were not in place, Pathfinder could have faced possible charges that it was violating the policy requirement for hosting a convening at which the participants spoke so freely.

33. Pathfinder's Mukta program also conducts outreach to brothel owners and pimps in an attempt to foster safer sex practices. While Pathfinder conducts this work for the purpose of promoting HIV prevention and assisting the women in the brothels, it also must at times

gain the trust of brothel owners in order to gain access to the women it is trying to help. Although Pathfinder believes that this outreach does not violate the policy requirement as set forth in the Global AIDS Act, it fears that Defendants USAID, HHS and CDC might view this outreach as being insufficiently "opposed to prostitution."

b) Brazil

34. A second project affected by the policy requirement is work performed by Pathfinder employee Dr. Carlos Laudari in Brazil. In Brazil, Dr. Laudari provides technical assistance in capacity building. As part of this work, he serves as a facilitator in strategic planning to various associations including some sex worker associations. For example, in late February 2008, Dr. Laudari plans to serve as a facilitator at Brazil's National Consultation on Prostitution, HIV/AIDS and Human Rights. It is likely that participants in the meeting will discuss the vulnerability of prostitutes to rights violations by the police, pimps and others. Participants may well recommend that prostitution be de-penalized in order to decrease this vulnerability. Were Pathfinder not under the protection of the preliminary injunction, Dr. Laudari would need to censor his speech at the convening to ensure that his involvement did not bring Pathfinder into violation of the policy requirement.

* * * * *

41. The policy requirement also affects Pathfinder's ability to publish in the U.S.—on its website and elsewhere—the results of the HIV/AIDS research it conducts and the HIV/AIDS training materials it creates. For example, in 2004 Pathfinder produced a handbook

funded by the Canadian International Development Agency, called "The Nigeria HIV/AIDS Responsive Fund (NARF) Handbook on Incorporating Gender and Human Rights in HIV/AIDS Training," the relevant pages of which are attached as Exhibit B. Pathfinder continues to make the handbook available to interested people in Nigeria, the U.S., and elsewhere through its website. Were the preliminary injunction lifted, it is possible that the Defendants would construe the policy requirement broadly to bar Pathfinder from distributing this handbook, because it discusses "laws proscribing sex work" as a human rights factor making women particularly vulnerable to HIV, and lists "legislation" and "government policies" as "possible contents of HIV/AIDS mitigation training." See Exhibit B, pp. 34, 39.

42. Likewise, Pathfinder staff regularly attend conferences in the U.S., sponsored by Global Health Council, the American Public Health Association ("APHA"), InterAction and other groups, at which they discuss their ongoing work, including their HIV/AIDS prevention work and research among sex workers and their clients. For example, Pathfinder plans to present 14 papers at the upcoming 35th Annual International Conference on Global Health, sponsored by the Global Health Council, which will be held in May, 2008. One of those papers, titled "Condoms and Health Care: Sex Workers Need More," will be based on the work of Pathfinder's Mukta project with sex workers in India. Pathfinder staff presented another paper based on the work of the Mukta project at the November 2007 meeting of the APHA. An abstract of that paper, entitled, "Men Behind the Menace: An Ethnographic Study of Male Clients of Female Sex Workers in the Wake of the HIV/AIDS Epidemic in

India," is attached as Exhibit C. Were the preliminary injunction lifted, Pathfinder would have to censor its speech at these conferences to ensure that none of its presentations could be construed, even inadvertently, as being insufficiently opposed to sex work.

* * * * *

V. The Burdens Imposed by the Guidelines

45. The guidelines issued by Defendants USAID and HHS in July 2007 only exacerbate the problems associated with the policy requirement. They do not answer any of the most basic questions about what Pathfinder can and cannot say with our private funds and they make the creation of an affiliate prohibitively burdensome.

A. Vagueness

46. The guidelines have only increased Pathfinder's uncertainty about the speech and activities in which it is permitted to engage under the policy requirement. Significantly, the guidelines offer no guidance about which activities Pathfinder must conduct through a separate entity.

47. Moreover, although the guidelines require that Pathfinder be "physically and financially separate from the affiliated organizations," they do not provide clear guidance regarding how Pathfinder can ensure that it is physically and financially separate enough. Rather, they list five factors, warning that the agencies "will determine, on a case-by-case basis and based on the totality of the facts, whether sufficient physical and financial separation exists. The presence or absence of any one or more factors will not be determinative." As President

of Pathfinder, I recognize that, given the enormous financial and even criminal penalties that may flow from a violation of the policy requirement and its guidelines, the only prudent course would be for Pathfinder to maintain very great separation between its activities and the activities of any affiliate that engages in activities barred by the policy requirement. Although Defendants might conceivably permit a lesser level of separation, I have no way of knowing that without risking grave consequences for the entire organization.

48. The guidelines' vagueness is exacerbated by the vagueness of the individual factors the Defendants will consider in deciding whether Pathfinder and any other entity are "physically and financially separate," many of which use terms such as "the extent to which" and "the degree of." For example, among the five factors are: a) "[t]he degree of separation from facilities, equipment and supplies used by the affiliated organization to conduct restricted activities," b) "the extent of such restricted activities by the affiliate," c) "[t]he extent to which signs and other forms of identification which distinguish the Recipient from the affiliated organization are present, and signs and materials that could be associated with the affiliated organization are absent," and d) "[t]he extent to which [Defendants], the U.S. Government and the project name are protected from public association with the affiliated organization and its restricted activities in materials such as publications, conferences and press or public statements." I do not know how much of any of these factors is too much. As a result, if the preliminary injunction is lifted I will need to ensure that Pathfinder complies with each factor to the maximum extent.

B. Legally separate entity

49. In addition to being vague, the guidelines place an extremely heavy burden on Pathfinder's ability to set up an affiliate to use private funds to engage in activities otherwise barred by the policy requirement.

50. For example, the guidelines require that the affiliate be "a legally separate entity." Setting up an affiliate in each of the 27 countries in which Pathfinder operates —or even in each of the 18 countries in which Pathfinder operates programs that receive no PEPFAR funds— would be extraordinarily difficult, expensive, and time-consuming.

51. In some of the countries where Pathfinder operates, it would be virtually impossible to obtain permission to set up a new affiliate, particularly one dedicated to policy advocacy or to the always controversial activity of working with sex workers, or one funded primarily with money coming from the United States.

52. Even when Pathfinder is able to obtain legal permission to operate a new affiliate, it will be difficult or impossible to obtain funding for such an affiliate. Whether Pathfinder seeks government or private funds for its initiatives, it must compete against other organizations also wishing to obtain the funding. Government and private funders alike favor organizations with a proven track record—one that has experience both doing the types of work we seek funding to do, and operating in the countries in which we propose to operate.

53. Pathfinder tends to be highly competitive in this regard because we have been operating worldwide for over half a century. We have vast experience, and are

able to describe our significant successes, in providing family planning and reproductive health services, halting the spread of HIV/AIDS, improving maternal and child health, and preventing unsafe abortions. We also have a long tenure, and extensive and close relationships, in most of the 27 countries in which we currently operate. Whether Pathfinder continues receiving Global AIDS Act funds and shifts its private funds to an affiliate, or whether Pathfinder continues using its private funds itself and shifts its Global AIDS Act funds to a new affiliate, the affiliate will lack Pathfinder's proven substantive expertise and deep ties in the 27 countries where Pathfinder operates.

54. Indeed, if Pathfinder tries to shift its Global AIDS Act funds to an affiliate so that Pathfinder can continue engaging in activities otherwise permitted by the policy requirement, that affiliate will be statutorily barred from receiving Global AIDS Act funds for at least 18 months. The Foreign Assistance Act provides that the United States' foreign assistance programs should be carried out "by such private and voluntary organizations and cooperatives as have demonstrated a capacity to undertake effective development activities." 22 U.S.C. § 2151u(a). In accordance with this statutory obligation, USAID bars non-profits from registering as private voluntary organizations (as they must do to get funded) until they have been incorporated for at least 18 months. 22 C.F.R. § 203.3(f)(4).

55. Even after the 18-month bar is over, the affiliate will continue to be at a severe competitive disadvantage in obtaining Global AIDS Act funding, because Defendants evaluate funding proposals from Pathfinder and other entities based in part on the experience possessed

by the potential recipient. USAID's own internal guidelines for grant distribution require USAID to take "past performance" into account in evaluating a funding proposal. USAID, ADS 303.3.6.3. Accordingly, every USAID application requires us to describe our past performance on other, similar projects. *See, e.g.*, USAID, Request for Applications Number USAID-Tanzania-08-001-RFA, pp. 5, 18. CDC also examines our past work.

56. So long as we are able to operate as Pathfinder, our past performance will continue to make us highly competitive. For example, in reviewing a proposal that the CDC awarded to Pathfinder in 2004 to expand home-based care for people living with HIV/AIDS in Tanzania, CDC lists as strengths Pathfinder's experience working in the country since 1995, engaging in similar work in other parts of the country, and relationships with US government partners and NGOs. CDC, Summary Statement, Program Announcement # 04208, pp. 2-5, attached as Exhibit F. CDC relied on a similar evaluation of Pathfinder's track record in awarding us a cooperative agreement to work in Botswana. CDC, Summary Statement, Program Announcement 04256, pp. 1-3 (Aug. 24, 2004), attached as Exhibit G. A new affiliate, unable to rely on this track record, will be unable to compete successfully for Defendants' funding.

57. If Pathfinder keeps its Global AIDS Act funding, its new affiliate will still be at a competitive disadvantage, this time in seeking non-U.S. government funding. Like Defendants, the private funders who underwrite Pathfinder's work do so in large part because of our proven track record. For example, in announcing a $690,000 grant to Pathfinder for a new leadership training program for individuals to help reduce maternal

mortality and morbidity and improve young people's sexual and reproductive health in Nigeria, the John D. and Catherine T. MacArthur Foundation wrote, "Pathfinder International, with its long track record in running successful training programs in the field, is well-positioned to help Nigeria build leadership to ensure this happens." See Exhibit H.

C. The Five-Factor Physical and Financial Separation Test

58. As mentioned above, because it is impossible for me to know how much weight Defendants will place on each of the five factors to be weighed in determining whether Pathfinder maintains sufficient physical and financial separation from an affiliate engaging in work otherwise barred by the policy requirement, I would need to ensure that Pathfinder maintains as much separation as possible from any such affiliate. This would impose severe burdens on Pathfinder's exercise of its First Amendment rights.

1) Separate personnel, management and governance

59. The first factor considered in assessing physical and financial separation is "the existence of separate personnel, management, and governance."

a) Separate personnel

60. The separate personnel requirement will, in some instances, make it impossible for Pathfinder to do its work and, in all instances, will make it prohibitively more expensive for Pathfinder to operate.

i. Duplicate headquarters staff

61. To understand the severe burdens the separate personnel requirement would impose on Pathfinder it is necessary to understand how Pathfinder operates. In order to coordinate its worldwide operations, reduce its worldwide overhead, and ensure that even its smallest and most remote projects are as technically proficient as possible, Pathfinder maintains personnel at its headquarters in Massachusetts who carry out the following functions for, and in coordination with, our field offices: human resources, resource development (including fundraising), accounting and other financial administration, information technology services, and substantive technical expertise. For example, our headquarters human resources staff hire senior staff for the field offices, and also any employees who are not residents of the country in which the field office is located. For small field offices, the human resources staff sometimes does all or part of local hires as well, including by reviewing resumes of local job applicants, checking references, conducting interviews, and making job offers. The human resources staff also does the following for the field offices: a) drafts job descriptions, b) conducts country-specific compensation surveys, c) puts together country-specific salary and benefits packages for senior staff and often for other staff too, d) reviews the local employment laws, e) creates country-specific employment handbooks, and f) administers benefits. When necessary, headquarters human resources staff travel to the field offices to do such tasks as recruiting, conducting job interviews, and counseling local employees.

62. Similarly, our headquarters information technology staff run a worldwide computer network in which the

field offices participate. They protect the network against spam and viruses, and do other necessary work to ensure that it runs smoothly. They also arrange for wiring in the field offices, set up computer equipment in those offices, arrange for software licenses, and do whatever trouble-shooting is necessary on an ongoing basis. When necessary, they travel to the field offices to perform these tasks.

63. Our headquarters technical services staff, which consists of highly trained professionals with expertise in the substantive work carried out by our field offices, provide substantive assistance to our field offices. For example, we employ: a) a nurse midwife who trains health care providers in our field offices about how to conduct trainings, b) monitoring and evaluations experts who help field office staff design and implement monitoring and evaluation programs to assess the success of their own projects, c) HIV/AIDS experts, and d) an adolescent reproductive health specialist.

64. Other headquarters staff review and approve all office leases, help open and monitor bank accounts, raise funds from government and private sources, and administer our contract and grant relationships with our funders, subgrantees, and suppliers.

65. By providing such extensive support to our field offices, we are able to operate high quality programs with very little overhead. This is essential to our ability to carry out our mission, because if we had to spend more of our funding on overhead we would have less available for our programmatic goals.

66. Moreover, keeping our overhead low is essential to our ongoing fundraising efforts. Fundraising is a com-

petitive business. Given a choice between an organization with high overhead and one with lower overhead, both government and private donors will choose the latter. For this reason, many potential donors ask us how we calculate our overhead, and why it is as high as it is. We hear particular concerns about high overhead from our smaller funders, who want their funding to go to achieving program goals, not to overhead.

67. Indeed, in my experience raising funds for Pathfinder, I have seen that non-profit ratings published by websites such as Charity Navigator and Charity Watch play an increasing role in our donors' funding decisions. On those websites, the percentage of budget going to overhead plays a large role in determining how a non-profit will be rated.

68. Accordingly, we have worked hard to bring our overhead down as low as possible. Approximately seven years ago, our overhead was almost 23 percent. At the time, we heard from many funders that our overhead was too high. Today, in large part because of the process efficiencies implemented at our headquarters and increased program support funds, our overhead is 13 percent. This has made it far easier for us to compete for funding.

69. One measure of this is the ratings we have received. We have received four stars—the highest possible score—from Charity Navigator, whose rating of Pathfinder is attached as Exhibit I. We have received an A+—the top rating—from the Charity Watch program run by the American Institute of Philanthropy, whose rating of Pathfinder is attached as Exhibit J. The Better Business Bureau, whose rating of Pathfinder is at-

tached as Exhibit K, has certified that we meet all 20 of its Standards for Charity Accountability. The low percent of budget we spend on overhead plays a large role in each of those designations.

70. If we had to establish a separate affiliate program, we would be faced with a terrible choice, either of which would impose enormous burdens on the organization. One option would be for us to replicate all of the functions of our headquarters in a second headquarters, leaving us with two duplicative headquarters, each of which would serve fewer (or smaller) programs. Salary costs alone would make it prohibitively expensive to operate two separate sets of headquarters staff, but there would be other costs too. For example, our headquarters staff frequently travel to the field offices to attend regional meetings of senior staff, to establish computer networks and bank accounts, to help with computer problems, employee hiring or other personnel issues, or to provide substantive technical assistance. If we had two sets of headquarters staff, each serving a separate but parallel set of field offices, we would have to pay for twice as many trips abroad by our headquarters staff, which would be extremely expensive. In these ways, the overhead costs of each organization would be significantly increased.

71. The other option would be to reduce the size of the headquarters staff for each organization, and require the field offices to take on the tasks that headquarters currently does. This, too, would increase our overhead, because we would lose the efficiencies we currently gain by centralizing so many functions. Moreover, we simply could not afford to replicate each headquarters function in each field office, and so we would have to function

without much of the expertise our field offices currently benefit from.

ii. Duplicate field offices staff

72. In addition to duplicating our headquarters staff, we would have to duplicate our field office staff. Duplicating the head of each field office (called the "country representative") would be difficult or impossible in most instances. For each country, we try to hire as our representative and senior management the people with the best experience both working in that particular country or region, and carrying out the particular types of programs that field office runs. This is the only way to make our funding applications competitive, because we must state on our funding applications who our country representative and other key people will be, and funders place great weight on their qualifications. If another organization has a country representative and other key personnel who are more experienced than ours, they are likely to be funded instead of us.

* * * * *

75. Moreover, our country representatives and other senior staff must be able to implement a program the moment it is funded, because our funders will not pay for training or start-up time. As a result, if either Pathfinder or a new affiliate were unable to use our current country representatives and senior staff, and had to hire new ones, it would be at a severe fundraising disadvantage.

76. In some of the countries in which Pathfinder operates, maintaining two sets of personnel is impossible. As a general matter, Pathfinders' field offices try to employ

residents of the country in which they operate ("local residents"), because they have greater knowledge about and contacts within their country, no visa or work permit restrictions, and are more likely to be acceptable to the local government. However, in many of the countries where we operate there is no professional level workforce from which we can hire senior managers. Consequently, many of our country representatives are either United States expatriate or third party nationals (collectively, "expatriates"). Sometimes we also have to hire expatriates to fill other senior staff or technical positions.

77. It can be extremely difficult, and is sometimes impossible, to get both a visa and a work permit for non-citizens in the countries in which we operate. In many countries, the process requires us to hire a local attorney, advertise the position locally to see if any local residents apply, and then demonstrate that none of the local applicants are qualified. This can take several months, at best. Often, we are unsuccessful. For example, last year we were unable to obtain an Indian work permit for a Bangladeshi employee with extensive expertise in working to prevent HIV/AIDS transmission among men who have sex with men—expertise we needed for that particular position. To take another example, for the past five months we have been trying, without success, to get a Tanzanian visa for one of our employees. If we had to try to get two sets of non-citizens into each country where we work, we would have to do twice the work to get visas and work permits (including paying double the attorneys' fees), and—because it would be difficult to explain why we need to bring in so many non-citizens

—would have even more difficulty getting the permissions we need.

78. Even when we are able to get permission to bring expatriates into a country, bringing them in is an expensive proposition. In order to be attractive to qualified potential applicants, we match the salary (generally in the six-figure range for our top managers) provided by the State Department in the countries in which we work. On top of the base salary, we provide a "post differential," to compensate employees serving in areas where the U.S. Department of State considers living conditions to be particularly difficult, demanding, or unhealthful. In Ethiopia, the current post differential is 30 percent of the base salary. We also provide a "danger pay allowance," to compensate employees in foreign areas where civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well-being of our employees. In Khartoum, Sudan, for example, the danger pay rate is currently 25 percent of base salary.

79. We also match the benefits packages provided by the State Department. This is an expensive package, and takes a good deal of work by headquarters staff to implement. For example, we provide non-citizens with housing. If we do not have enough information about the cost of comparable housing in that country, the employee must obtain multiple bids before entering into a lease, which can be time-consuming. Suitable housing stock is extremely limited in most of the countries in which we work, so we are forced to pay the exorbitant rents generally charged to non-nationals, which can run between $30,000 and $50,000 annually. Additionally, the shortage of suitable housing allows landlords in many

countries to require us to pay not only a security deposit, but also the first and last months rent up front. In some countries we must even pay rent in full a year or two in advance. This vastly increases the up-front cost of hiring new employees, and also increases our financial risks, because if the employee stops working for us before the end of the lease term we generally cannot recover the rent we have pre-paid.

80. We also pay for and ensure that our employees have access to electricity and other utility services in their residences. In many countries where we work, the electrical grid is unreliable, so we have to pay as much as $20,000 to purchase a generator for each residential unit.

81. Where necessary, we provide security for our staff living overseas. For example, because of the ongoing turmoil in Kenya we are currently providing 24-hour security for each employee in that country.

82. We also pay for education for the children of our expatriate employees. For older children in countries where the local education system is insufficient, we pay to send the child to a boarding school abroad. This can be extremely expensive: $48,300 per child annually for education abroad for employees based in India, and $54,950 per child annually for education abroad for employees based in Mozambique.

83. We pay for one trip home each year for all expatriate employees and their immediate family. For a family of four this can be as much as $8,000 annually. We also cover the cost of round-trip airfare for expatriates and their families in the event of serious illness or death in their immediate family.

84. Finally, we pay for our expatriate employees to move to the countries where they will be working, and then to move home again at the end of their employment. The amount varies depending on the size of the family, but can cost as much as $15,000 for each move, in addition to the airfare.

85. If we had to maintain two field offices in each country instead of one, we would need a separate expatriate country representative for each, instead of the one we currently have. We also might need duplicate expatriate senior management and technical staff. For each of these duplicate employees, we would incur all the costs outlined above.

86. In addition to duplicating expatriates, we would also have to duplicate staff who are citizens of the country in which the field office operates. In many cases, this would be difficult or impossible, because in many of the countries in which we operate there are few people with the education and experience we require. For example, we often need senior staff with experience in how to prevent the spread of HIV/AIDS among particular populations, or in non-profit or governmental capacity-building. Finding one local person with such expertise is difficult. In many instances, finding two would be next to impossible.

* * * * *

b) Separate management and governance

89. The requirement of separate management and governance would make it impossible for Pathfinder to exercise its First Amendment rights through any affiliate. Pathfinder's By-Laws, which are attached as Ex-

hibit N, vest the corporation's governance in a Board of Directors. If Pathfinder's board were unable to control the board or senior staff of an affiliate, it could not use Pathfinder's non-U.S. government funds to speak through that affiliate.

2) Separate accounts, accounting records, and timekeeping records

90. The second factor Defendants' guidelines consider in assessing physical and financial separation is "the existence of separate accounts, accounting records, and timekeeping records." In some instances, it would be simply impossible for Pathfinder to satisfy the dual accounts requirement. India, for example, exercises close controls over the bank accounts of foreign NGO's in order to control terrorism and the movement of funds across its borders. As a foreign NGO, the Foreign Contribution (Regulation) Act limits us to maintaining only one bank account that receives funds from abroad or receives U.S. currency. Foreign Contribution (Regulation) Act, § 6 (India). In order to open that account, and to add or remove signatories, we must get government permission, which can be extremely slow. It recently took us almost an entire year—and a pile of paperwork almost an inch think—to get permission to have a local Indian employee added as a signatory to an existing account. On some occasions, we have been unable to get former employees removed as signatories for months after we requested that they be removed. It would be extremely difficult and time-consuming for us to seek permission to open a second bank account for a new affiliate and there is no guarantee that we would ultimately obtain approval.

91. Even where we are able to obtain permission to open two separate accounts, doing so would be quite expensive. Pathfinder's policy is that a member of the headquarters staff should be a signatory on every bank account, in case there is a revolution or other reason for headquarters to need direct access to the account. In many countries, each potential signatory must appear in person at the bank in order to obtain permission to act as a signatory. As a result, if we had to maintain two bank accounts in each country, and if we had to have two separate headquarters employees as signatories, we would have to send each of those headquarters employees to each country, instead of sending just one.

3) Separate facilities, equipment and supplies, and extent of affiliates' restricted activities

92. The third factor Defendants' guidelines consider in assessing physical and financial separation is "the degree of separation from facilities, equipment and supplies used by the affiliated organization to conduct restricted activities, and the extent of such restricted activities by the affiliate." Opening a physically separate office in each country, and every part of each country, in which Pathfinder operates will be extremely difficult in some places, and impossible in others, because some of the countries in which we operate require us to obtain permission before we open a new office.

93. Additionally, opening and maintaining an office abroad is an extremely expensive proposition for Pathfinder. Having to duplicate those costs would be exorbitant. For example, our office rents are often quite expensive. Moreover, just as often we must prepay a year or two of rent on our residential leases, often we must

prepay rent on our office leases. That increases our financial risks, because if we have to close an office before the end of the lease term we lose the remainder of the rent we have prepaid.

94. In many of the countries in which we work, we must install and maintain our own telephone and internet data lines, and satellite dishes, which we would need to duplicate in a second office. We also install and maintain a computer server for each of our offices with at least six employees. For offices with more than one employee, we purchase at least two printers, and use one only for confidential financial and personnel information. We would have to duplicate all of these resources for a second country office.

95. Maintaining two offices would also require us to maintain two separate insurance policies. We operate in countries where war, civil unrest, crime, car accidents, and disease are all serious threats. We try to minimize our exposure to risk by buying extensive insurance coverage—as many as 8 to 10 different policies in some countries. Buying a second set would be extremely expensive.

96. We maintain a fleet of cars for most of our offices, because a car and a driver is a security necessity. Also for security reasons, and because of the generally poor conditions of the roads, we tend to buy four-wheel drive, all-terrain SUV's. Buying two separate fleets of cars would, consequently, be extremely expensive.

97. We must purchase generators for many of our offices, because the electrical grid is unreliable. Because our offices rely heavily on computers for communication, our power needs are extensive. Generators large

enough to meet our power needs can cost as much as $50,000.

98. The guidelines' third factor also takes into account "the extent of such restricted activities by the affiliate." I have no way of knowing how many restricted activities would be too many. But this factor seems to require that I ensure that each affiliate engage in a substantial amount of activities that are permissible under the policy requirement. Those activities could not, of course, be funded by the Global AIDS Act, because the affiliate could not receive any Global AIDS Act funding. So I would need to ensure that we have some other source of funding for those activities. In effect, this factor permits Pathfinder to use an affiliate to carry out privately funded activities otherwise barred by the policy requirement only if we have funds for those activities, *and* for a substantial number of activities that would be permissible under the policy requirement, *and* to establish and maintain a separate affiliate. This amounts to an extra, unnecessary tax on our ability to engage in constitutionally protected speech and activities with purely private funds.

99. I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 7, 2008
Washington, District of Columbia

/s/ DANIEL E. PELLEGROM
DANIEL E. PELLEGROM

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. AND OPEN SOCIETY INSTITUTE, PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT AND ANDREW S. NATSIOS, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, DEFENDANTS

[Aug. 24, 2005]

DECLARATION OF PEDRO CHEQUER, MD, MPH

I, PEDRO CHEQUER, declare, under penalty of perjury under the laws of the United States of America, that the following is true and correct:

1. My name is Pedro Chequer. I submit this declaration in support of the Plaintiffs' motion for a preliminary injunction.

2. I am the Co-Founder and Director of the Brazilian government's National AIDS Programme. After helping to establish the National AIDS Programme in 1987, I served as its Director from August 1996 to March 2000. I subsequently served as the representative for the Joint United Nations Programme on HIV/AIDS

("UNAIDS") in South America, Russia and Mozambique. I returned to the National AIDS Programme in August 2004, where I oversee implementation of Brazil's aggressive HIV prevention programs. I am a specialist in epidemiology, public health and sanitary dermatology.

3. Brazil's HIV prevention program is recognized as one of the most effective and multi-faceted programs in the world. We have succeeded in slowing down drastically the rate of infection of HIV/AIDS in our country. For instance, in 1992, the World Bank forecast that Brazil would witness an explosive HIV epidemic, reaching 1.2 million individuals by 2000, but the number of estimated cases in 2004 was actually around 660,000.

4. The major components of our program, many of which are carried out in partnership with civil society, include HIV/AIDS prevention, care and treatment services. Our program includes education about HIV/AIDS, wide-reaching distribution of free condoms, and the manufacture and distribution of generic versions of antiretroviral drugs, which are provided at no cost to all HIV-positive people in the country.

* * * * *

8. Although the United State Agency for International Development ("USAID") offered more than $40 million to continue funding HIV/AIDS prevention efforts in Brazil through 2008, the National AIDS Programme, which acts as the central coordinator of all HIV/AIDS prevention efforts by government and NGOs, decided to reject the funds earlier this year. The decision of the National AIDS Programme was approved by the National AIDS Commission, a body composed of representatives of civil society and eight governmental minis-

tries. After careful consideration, we decided that it would be harmful to our program to have to oppose prostitution in order to comply with the requirements of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Global AIDS Act"), as implemented by USAID. In particular, we believed that we could not conduct effective outreach to and programs with sex workers if our NGO partners were forced to state their explicit opposition to prostitution, as USAID was requiring. Because we did not believe that we could carry on with our successful program consistently with the requirements under the Global AIDS Act as implemented by USAID, we chose to decline the substantial amount of aid that would have come into the country from USAID.

9. This was a difficult decision, because the National AIDS Programme never has enough funding to do all of the important work we need to do. Until this year, the money from USAID that supported our AIDS program played an important role in preventing the transmission of HIV among people at high risk for being infected.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on Aug. 24, 2005
Brasilia, Brazil

/s/ PEDRO CHEQUER
PEDRO CHEQUER

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

05-CV-8209 (VM) (DF)
ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC. ET AL., PLAINTIFFS

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., DEFENDANTS

[Feb. 5, 2008]

DECLARATION OF MARK SIDEL

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1. This Declaration addresses the legal and practical difficulties of establishing, registering, and operating new nonprofit organizations overseas, in light of the guidelines issued by the government (U.S. Agency for International Development and Department of Health and Human Services) under the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Guidelines"). The Guidelines prohibit grant recipients to from engaging in protected expression unless they do so through newly created, privately funded

separate organizations that would not be required to follow the Act's policy requirement.[1]

2. The Guidelines do not allow American charitable organizations working abroad adequate alternative channels for protected expression because it is simply too burdensome for non-profit organizations to create, establish, register, and operate new such organizations everywhere they work overseas.

3. In particular, the extraordinarily stringent requirements for organizational separation and independence—mandating "legally separate entit[ies]," that are completely "physically and financially separate," judged on factors that include "the existence of separate personnel, management, and governance," "the existence of separate accounts, accounting records, and timekeeping records,"[2] and separate signage and identification, are exceptionally burdensome for the Plaintiffs and for other American charitable and nonprofit organizations seeking to provide critical relief and development services that literally keep people alive in some of the world's most challenging countries.

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[1] *See* Acquisition & Assistance Policy Directive (AAPD) 05-04 Amendment I, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003—Eligibility Limitation on the Use of Fund and Opposition to Prostitution and Sex Trafficking, issued July 23, 2007 (U.S. AID Guidelines); Guidance issued by the Office of Global Health Affairs, Department of Health and Human Services, implementing Section 301(f) of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, issued July 23, 2007.

[2] *Id.* This wording appears in both the U.S. AID and Department of Health and Human Services guidance.

4. This Declaration addresses whether, and the extent to which, the Guidelines impose burdens on the establishment of affiliates in all of the countries in which these organizations operate, whether with US or private funds. By way of example, this Declaration establishes and details the legal and practical burdens in registering a new and separate nonprofit in five of the countries where Pathfinder International and CARE, which are members of InterAction and Global Health Council, operate outside the United States: India, Bangladesh, Mozambique, Ethiopia, and Peru.

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II. The Guidelines Impose Substantial Burdens on the Establishment and Operations of U.S.-based Nonprofit Organizations that Operate Abroad

11. The burdens of providing humanitarian assistance in most of the countries in which the members of InterAction and Global Health Council (collectively "members") operate become exceptionally burdensome when they must be shouldered twice, for new and separate organizations. In virtually every country abroad, including those in which the members operate, those burdens include those described below.

A. Burdens of Registering a New, Legally Separate Entity in Multiple Countries

12. The Guidelines would impose significant, often exceptional difficulties in securing permission to register and operate a new nonprofit entity in a foreign country. These difficulties are substantially exacerbated by the fact that organizations will have to explain to local government authorities (often multiple authorities, and at

different levels) why a second, separate and new registration for another entity is necessary.

13. In many countries in which the members operate, for example, approval and registration of a new and separate foreign affiliated organization is a long, cumbersome and exceptionally difficult procedure, involving substantial costs. It will be even longer, more cumbersome and difficult where it involves the second, new, and separate organization related to an American charitable organization and where the American parent must shoulder the additional burden of explaining to the foreign government why this arrangement is necessary. In some countries, government agencies responsible for approval and registration of foreign charities or their local counterparts may only allow each organization to have one address, or only to work in defined, preapproved areas of the country. As the International Center for Not-for-Profit Law (ICNL) has noted, there is currently "a regulatory backlash against NGOs that has caused growing concern among commentators and practitioners throughout the world. In the past 2 years alone, more than twenty countries have introduced restrictive regulations aimed at undermining civil society. These countries join scores of others with existing laws, policies, and practices that stifle the work of civil society organizations."[5]

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[5] David Moore, *Safeguarding Civil Society in Politically Complex Environments*, 9:3 *International Journal of Not-for-Profit Law* (July 2007), at www.ijnl.org. On the government-caused problems of registration in a disaster-ridden nation, see also International Federation of Red Cross and Red Crescent Societies (IFRC), *Law and Legal Issues in International Disaster Response: A Desk Study* (2007), at 13.

B. Difficulties Securing Visas and Work Permits for Foreign Employees Of New Entity

14. Members will face difficulties securing visas and/or work permits for American or other foreign employees of the new entity, difficulties exacerbated because many countries may not issue visas or work permits for additional foreign personnel in a new and separate entity—and where the government Guidelines appear clearly to prohibit the "dual use" of personnel across both affiliates.

15. As the International Red Cross has found, governments frequently limit the number of visas and/or work permits that can be given to foreign nongovernmental organizations, impose substantial waiting times or approval procedures, and require that the organizations to whom such foreign individuals will be assigned be fully registered and approved. In fact, some 77% of international humanitarian organizations responding to an International Red Cross survey reported significant difficulties in this area.[6] All of these processes would become considerably more difficult and complex under the Guidelines.

C. Expenses of Paying for Separate Office Space, Staff, and Equipment

16. Members will face expenses—sometimes exorbitant expenses—of paying for new and separate office space, local staff, foreign staff, necessary vehicles (in-

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[6] *See* International Federation of Red Cross and Red Crescent Societies (IFRC), *Law and Legal Issues in International Disaster Response: A Desk Study* (2007), Sec. 10.1, p. 116, at http://www.reliefweb.int, (attached in relevant portion as Exhibit C hereto).

cluding customs and tax costs as well as vehicle costs),[7] office equipment, security, telephone and Internet access, and other services.[8] These expenses would be exacerbated because, according to the Guidelines, they cannot be shared by the organizations, which must remain separate in all ways.

D. Problems Opening Bank Accounts

17. Members will face particular problems associated with opening bank accounts by nonprofit and nongovernmental organizations in many countries. Banks may require evidence of registration with and approval by the government, and national laws or regulations may limit the number of bank accounts or even prohibit multiple accounts per organization, per donor, or per project (as has been the case in India under the Foreign Contribution (Regulation) Act).[9] These already complex and difficult provisions would be exacerbated by implementation of the Guidelines.

E. Tax Burdens

18. The procedural tax burdens on branches, affiliates or grantees of American charitable organizations in developing countries are already burdensome, and the ad-

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[7] For example, the same International Red Cross study cited above noted that 40% of international humanitarian organization headquarters reported that customs problems with importing telecommunications equipment were "always or frequently present." *Id.* at 199.

[8] In yet another example, the Red Cross study found that 85% of international humanitarian organization headquarters reported barriers to hiring local staff. *Id.* at 120.

[9] The International Red Cross also reported that 85% of international humanitarian organization headquarters had difficulties in opening bank accounts in the countries where they work. *Id.* at 126.

dition of a requirement for new and separate organizations is likely to significantly confuse the issues of tax exemption and tax deductibility for domestic affiliates, and to re-raise with government officials the question of the tax treatment of organizations related to American charities and nongovernmental organizations, resulting in substantial additional burdens. In certain cases, national governments may even question whether existing organizations, operating on a tax exempt basis, should be re-classified or reexamined, causing exceptional burdens not only for the new and separate affiliate but potentially for the existing organization as well.[10]

F. Additional Political and Security Suspicion of New and Separate Establishments in Foreign Jurisdictions

19. Members will face substantial risk of significantly enhanced suspicion by government, security, intelligence and police authorities in countries concerned that new and separate organizations are being created in order to evade tax, customs, or other government regulations. In a number of countries, government authorities, service providers, the media and other institutions are likely to believe that new and separate groups are being established in order to separate grantmaking and programs from advocacy, and thus to substantially increase advocacy activities, support for dissidents, and other activities that may be highly unpopular to government authorities.

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[10] For examples of the significant tax burdens and difficulties that can be encountered, see the International Red Cross study, *id.* at secs. 12.1, 12.3, pp. 125-29.

20. Such "doubling up" would also cause, in many countries, increased foreign country intelligence targeting of the American organizations, and increased suspicion in some countries that the new and separate groups are being formed to engage in destabilizing activities or activities in support of armed or other dissidents.

G. Fundraising Difficulties

21. The Guidelines will also make it more difficult—perhaps considerably more difficult—for institutions to raise funds for two reasons.

22. First, in a highly competitive fundraising environment, the newly-formed separate organizations would have no track record of accomplishment on the ground on which to raise funds. Because of the exceptionally detailed separation requirement, the new and separate affiliates are unlikely to be able to rely on the track record in effective work on the ground established by the already-existing organization.

23. Second, the increased administrative costs incurred from dividing the work that a member does in dozens of countries into new and separate organizations would likely downgrade a member's ranking by independent certification organizations that rank charitable organizations.

24. In response to concerns about effectiveness and efficiency in the American charitable sector, a number of rating and ranking organizations evaluate non-profit administrative costs and the ratio of administrative to program costs. This burgeoning sector includes the Better Business Bureau Wise Giving Alliance (www.give.org), Charity Navigator (www.charitynavigator.org), Guidestar (www.guidestar.org), Charity Watch (Ameri-

can Institute of Philanthropy) (www.charitywatch.org), and others.

25. Less favorable rankings or ratings, in turn, can have a distinctly negative impact on the ability of organizations to raise funds from the public. They may even impact the ability to obtain funds from the government. In my own experience as a grantmaker with a major private foundation, and as a consultant to other foundations and scholar of philanthropy as documented earlier in this Declaration, I am of the opinion that the requirements of the Guidelines and the implications of those requirements for administrative expenses, ratings and related issues would negatively impact fundraising by affected institutions.

H. All of These Factors Impose Substantial Burdens on Members' Operations in the United States

26. The cumulative effect of these burdens in multiple countries is likely to be very substantial. But beyond the burdens on the new and existing related organizations in many developing countries, the various burdens, in dozens of countries, will in turn cause substantial burdens for the home offices of American charitable institutions, adding substantial administrative costs that neither government funding nor private donors are likely to cover because these expenses do not contribute directly to the resolution of hunger, poverty, illness and other problems in developing countries, but must be managed solely in response to the government's Guidelines.

III. Examples of the Burdens the Guidelines Impose in Five Key Identified Countries in Which Plaintiffs are Active

A. India

27. Requiring American charitable organizations to establish new and separate affiliates in India, in addition to the operations that they have established through long and assiduous effort, is likely to be exceptionally burdensome and result in long delays, expensive processes, and government refusal to allow the registration and establishment of new and separate organizations.

28. The process for registering and establishing Indian affiliates of foreign charitable organizations, or foreign branches of charitable organizations, in India is already exceptionally complex and cumbersome, beginning with a difficult choice between registering and establishing as a society, trust, company or in some other form.

29. Registration and establishment in India takes months or years of application and seeking government approval, including consideration of the activities that the organization will carry out, examination of the proposed board, and other procedures. For foreign organizations establishing affiliated organizations in India, these processes are complicated by the required clearances that must be obtained from the Indian Intelligence Bureau (IB), Ministry of Foreign Affairs, and other government authorities.

30. Beyond the complexities and cumbersome process, it is possible or even likely that the Indian authorities, concerned with tracking and understanding the activities of foreign charitable and nonprofit affiliates in In-

dia, will merely refuse to allow the registration and establishment of parallel organizations. Such refusals are likely to take place on an organizational basis, and it would be in keeping with past Indian government practice for the government to make such decisions based in part on the advocacy activities of specific organizations.

31. Visas for foreign personnel are always complex and time-consuming to obtain. The government often imposes limits on the number of foreign personnel that can be employed by the affiliate of a foreign charitable organization, and it may well be impossible to convince the government to loosen that limit for new and separate affiliates of American charitable organizations.

32. The burdens of operations are particularly problematic in India. Affiliates and branches of foreign charitable and nonprofit organizations must engage in the highly cumbersome and time-consuming process of obtaining government authorization for duty-free import of vehicles and office equipment (because the government may not permit duty-free purchase of existing goods held by other charities in the country), and it may well be very difficult to obtain those permissions for two affiliates of the same foreign organization. Securing appropriate office space, telephone and Internet access and other necessary services can take months or longer. Accomplishing these tasks twice, for separate affiliates of the same American organization, is likely to be exceptionally difficult and spark suspicion that cheating, fraud, illicit or anti-government activities are at work.

33. There are other restrictions at work as well. The U.S. State Department noted in the most recent (March 2007) Country Reports on Human Rights Practices that

"NGOs must secure approval from the Ministry of Home Affairs before organizing international conferences. Human rights groups contended that this provided the government with substantial political control over the work of NGOs and restricted their freedom of assembly and association. NGOs alleged that some members from abroad were denied visas arbitrarily."[11] In addition, "[s]ome domestic NGOs and human rights organizations faced intimidation and harassment by local authorities."[12]

34. There is a long history of government suspicion of the foreign charitable sector in India, documented by the U.S. Department of State as recently as March 2007 in the most recent annual Country Reports on Human Rights Practices.[13] These historical influences increase the burdens on organizations establishing new and separate organizations, for the Indian government authorities at central and state levels will be suspicious that the new organization is being established to evade tax or customs requirements, or to engage in advocacy or political activities. The government ministries most likely to hold and act on these suspicions include the Ministry of

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[11] *See* the India Section of the U.S. Department of State, *Country Reports on Human Rights Practices 2006* (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78871.htm

[12] *Id.*

[13] For extensive information on suspicion of foreign religious and human rights organizations in India, for example, see the India section of the U.S. Department of State, Country Reports on Human Rights Practices (2006), at www.state.gov/g/drl/rls/hrrpt/2006/78871.htm.

Home Affairs, the Intelligence Bureau, and the Ministry of Finance.[14]

35. The establishment of new and separate affiliates of American charitable organizations in India would also almost certainly cause havoc and long delays in the receipt of funds from abroad for charitable work in India. This is because India has a long-standing and strictly applied process by which Indian nonprofits and charitable affiliates can receive and use foreign charitable donations, known in India as foreign contributions. The strict Foreign Contribution (Regulation) Act (FCRA) (attached as Exhibit C hereto), first adopted during the Indian Emergency in the mid-1970s, governs the receipt and use of foreign donations and requires organizations based in India to apply for approval as a foreign donation-receiving entity or to apply for special permission to receive funds on a one time basis.

36. Each of these alternatives—approval of organizations to receive foreign charitable donations, or approval of donations on a one-time basis—is exceptionally difficult and cumbersome. Indian government authorities—particularly the Ministry of Home Affairs, which administers the FCRA system, and the Intelligence Bureau, which conducts FCRA-related investigations of charitable and nonprofit organizations for the Indian government—remain suspicious that foreign charitable funds will be used for destabilizing religious, political, corrupt or other purposes in India. The U.S. State Department

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[14] The U.S. Department of State has extensively tracked and documented these issues. *See*, e.g. the India section of the U.S. Department of State, *Country Reports on Human Rights Practices 2006* (issued March 2007), as www.state.gov/g/drl/rls/hrrpt/2006/78871.htm.

has noted multiple instances in which these suspicions have resulted in denials of approval for foreign charitable funds to be used in India.[15]

37. In addition, as the most recent State Department country report on human rights in India points out, "[i]n February [2006], the Ministry of Home Affairs barred 8,673 organizations from seeking foreign funds under the Foreign Contribution and Regulation Act (FCRA), reportedly for failing to provide the proper paperwork. Under the ruling, these organizations need government approval before seeking aid from abroad. NGOs called the FCRA flawed and extremely restrictive and claimed that the government failed to notify organizations when the requisite paperwork was needed. Some human rights groups contended that FCRA was a means of intimidation and substantial political control by the government over the work of NGOs. NGOs expressed concern that the Home Ministry, which is normally not responsible for financial matters, was tasked with monitoring the finances of NGOs. The act has a clause that states the NGOs must also secure approval from the government before organizing international conferences, and some NGOs alleged that the government has denied visas to prevent members from holding confer-

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[15] *See* the India Section of the U.S. Department of State, *Country Reports on Human Rights Practices 2006* (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78871.htm. I have discussed this problem in India (as well as in Bangladesh) extensively in Sidel, *Courts, States, Markets and the Nonprofit Sector: Judiciaries and the Struggle for Capital in Comparative Perspective*, 78 *Tulane Law Review* 1611 (2004).

ences paid for with foreign funds."[16] The State Department report also pointed out that "[i]nternational human rights organizations were restricted, and foreign human rights monitors historically have had difficulty obtaining visas to visit the country for investigative purpose."[17]

B. Bangladesh

38. Requiring American charitable and nonprofit organizations to establish new and separate organizations in Bangladesh, under a system in which even the normal, seemingly uncontroversial establishment of a single charitable affiliate can cause enormous burdens and delays, is likely to be exceptionally burdensome and to result in long delays, expensive processes, and even government refusal to allow the registration and establishment of the new and separate organizations.

39. American charitable organizations have spent decades negotiating the byzantine and conflict-filled processes of government regulation of the foreign charitable sector in Bangladesh, and remain concerned that a conflict-ridden, often violent political culture marked by an impasse between two powerful political parties and military rulers will result in further erosion of the work that charitable organizations can do in Bangladesh.[18]

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[16] *See* the India section of the U.S. Department of State, *Country Reports on Human Rights Practices 2006* (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78871.htm.

[17] *Id.*

[18] *See, e.g.*, the discussion of charitable activities and dangers in *Philanthropy and Law in South Asia: Recent Developments in Bangladesh, India, Nepal, Pakistan, and Sri Lanka* (Asia Pacific Philanthropy Consortium, 2007, www.asianphilanthropy.org). *See also* The World Bank, *Economics and Governance of Nongovern-*

Under these tenuous and difficult circumstances, where "the relationship between nonprofits and the government has nearly always been characterized by tension and mistrust,"[19] requiring that American charities establish parallel organizations in Bangladesh is likely to prove exceptionally burdensome.

40. Registration and establishment in Bangladesh, as in India, takes months or years of application and seeking government approval, including consideration of the activities that the organization will carry out, examination of the proposed board, and other procedures. For foreign organizations establishing groups in Bangladesh, these processes are complicated by the required clearances that must be obtained from multiple government agencies, including the bureaucratic and politically driven NGO Affairs Bureau (NGOAB) and other government institutions. A report funded partly by U.S. AID found that "delays by NGOAB are frequent and often prolonged . . . NGOAB lacks capacity in the most fundamental aspects of its ability to perform its functions."[20]

41. Beyond the complexities and cumbersome process, it is likely that the Bangladesh authorities, as in India, concerned with tracking and understanding the activities of foreign charitable and nonprofit organizations, will merely refuse to allow the registration and estab-

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mental Organizations in Bangladesh (World Bank, April 2006, at www.worldbank.org.bd).

[19] *Philanthropy and Law in South Asia, supra* note 21, p. 5.

[20] Leon Irish, Karla Simon, and Fawzia Karim Feroze, *Legal and Regulatory Environment for NGOs in Bangladesh* (17 April 2005), funded by NORAD, SIDA, and U.S. AID and contracted by UNDP, at http://www.iccsl.org/pubs/bangladeshfinalreportmayl5.pdf, p. 10.

lishment of parallel organizations. Such refusals are likely to take place on an organizational basis, and it would be in keeping with past Bangladeshi government practice for the government to make such decisions based in part on the advocacy activities of specific organizations. A 2005 report partly funded by U.S. AID commented on the "much bad will and suspicion . . . between the NGOs and the GOB [Government of Bangladesh]."[21]

42. The U.S. State Department, in its most recent report (March 2007) on human rights practice in Bangladesh, noted that "[t]here were many examples of harassment [of foreign and domestic NGOs] by the [Bangladeshi] intelligence agencies.[22] "In September [2006], according to local human rights organizations, in anticipation of opposition protests in Dhaka, the government indiscriminately arrested hundreds of persons, including opposition activists and NGO supporters, on old cases or false charges such as theft. Most detainees were released within a few days. . . . In mid-September police throughout the country arrested 172 workers at different offices of the NGO Proshika, according to press reports."[23]

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[21] *Id.*, p. 19.

[22] *See* the Bangladesh section of the U.S. Department of State, *Country Reports on Human Rights Practices 2006* (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78869.htm.

[23] *Id.* The State Department also reported that "No action was taken nor charges filed related to the July 2005 deaths of two employees of the Christian Life Bangladesh NGO who were allegedly killed because they showed an evangelical film. Police initially arrested several suspects for the killing, but they were later released, and no charges had been filed at year's end."

43. Visas for foreign personnel are usually complex and time-consuming to obtain, as the U.S. Department of State has documented with respect to foreign religious personnel in Bangladesh as recently as March 2007.[24] The government often imposes limits on the number of foreign personnel that can be employed by an organization related to a foreign charitable organization, and it may well be impossible to convince the government to loosen that limit for new and separate affiliates of American charitable organizations.

44. The burdens of operations are particularly problematic in Bangladesh. Affiliates of foreign charitable and nonprofit organizations must often engage in a highly cumbersome and time-consuming process of obtaining government authorization for duty-free import of vehicles and office equipment (since the government may not permit foreign charities or their local affiliates to purchase existing, in-country goods on a duty-free basis), and it may well be very difficult to obtain those permissions for two groups related to the same foreign organization. Securing appropriate office space, telephone and Internet access and other necessary services can take months or longer. Accomplishing these tasks twice, for separate affiliates of the same American organization, is likely to be exceptionally difficult and spark suspicion that cheating, fraud, illicit or anti-government activities are at work.

45. Given the already heightened suspicions of the Bangladeshi authorities toward foreign charitable and nonprofit organizations, the authorities in Dhaka, like those in India, are likely to be highly suspicious that at-

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[24] *Id.*

tempts to establish parallel groups in Bangladesh are being undertaken to evade tax or customs requirements, or to engage in advocacy or political activities. The government bodies most likely to hold and act on these suspicions are the NGO Affairs Bureau, Ministry of Home Affairs, and ministries and agencies concerned with security and intelligence.[25]

46. As in India, the establishment of new and separate related organizations of American charitable organizations in Bangladesh would also almost certainly cause havoc and long delays in the receipt of funds from abroad for charitable work in Bangladesh. Bangladesh has a regulated system for approval of receipt and use of foreign charitable donations by Bangladeshi affiliates of foreign charities, and a separate system of approval of the activities of foreign charitable and nonprofit organizations working directly in Bangladesh.

47. The Foreign Donation (Voluntary Activities) Regulation Act 1978, revised in 1982 (attached hereto as Exhibit D), provides the legislative framework for this intensive regulation. The Act has been used to deny release of foreign donated funds to Bangladeshi NGOs allegedly because they were "involved in political activities" among other alleged transgressions, according to the government of Bangladesh.[26] Recently, the government has proposed strengthening and tightening the Act

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[25] *See* the Bangladesh section of the U.S. Department of State, *Country Reports on Human Rights Practices 2006* (issued March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78869.htm, for further information on suspicion of foreign NGOs.

[26] PRIP Trust Signs Undertaking to Get Back Fund, *New Age* (Dhaka), April 25, 2005, at http://www.newagebd.com/2005/apr/25/front.html.

on several occasions. To cite but one example, the government proposed prohibiting "political activity" by nonprofits, defined so broadly that advocacy activities by charitable organizations could well be included if government authorities disapproved of such activities.[27]

48. Bangladeshi government authorities remain suspicious that foreign charitable funds will be used for destabilizing religious, political, corrupt or other purposes in Bangladesh.

C. Mozambique

49. In Mozambique, requiring American charitable organizations to establish new and separate organizations for work there would be a highly burdensome task. The situation for American charitable organizations seeking to register and work in Mozambique is already very difficult. As the U.S. State Department recently reported, "[a] government decree regulates the registration and activities of foreign NGOs. Nonpolitical foreign NGOs and religious groups must register with the Ministry of Foreign Affairs and Cooperation and are required to provide significant details on their organization's projects, staffing, and finances. . . . The registration process for foreign NGOs and religious groups reportedly involved significant discretion on the part of government officials and regularly took several months."[28]

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[27] *Philanthropy and Law in South Asia: Recent Developments in Bangladesh, India, Nepal, Pakistan, and Sri Lanka* (Asia Pacific Philanthropy Consortium, 2007, www.asianphilanthropy.org), pp. 5-7.

[28] U.S. Department of State, *Country Reports on Human Rights Practices 2006* (March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78748.htm.

50. Human Rights Watch has documented that authorization under this decree, Decree 55/98 (attached hereto as Exhibit E), "is provided to NGOs whose activities conform with the Government program. . . . The Ministry issues two-year renewable permits to those NGOs who are authorized to register."[29] Under these difficult circumstances—where registration and establishment of a single foreign charitable office is risky and complex at best—expecting and requiring foreign charitable organizations to establish new and separate organizations in Mozambique under Mozambican law would be exceptionally difficult to well-nigh impossible.

51. Beyond the complexities and cumbersome process, it is likely that the Mozambican authorities concerned with tracking and understanding the activities of foreign charitable and nonprofit groups, will, at least in some cases, merely refuse to allow the registration and establishment of parallel organizations. Such refusals are likely to take place on an organizational basis, perhaps penalizing those charitable organizations more involved with advocacy activities that challenge the government.

52. Permission to work and visas for foreign personnel are complex and time-consuming to obtain. As Human Rights Watch has reported, "Foreign employees working for foreign NGOs must conform with the Labor Law, Decree 8/98 [attached in relevant part hereto as Exhibit F]. *Inter alia*, the partner organization and the foreign NGO must verify that no Mozambican has the necessary qualifications before an expatriate may be

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[29] Human Rights Watch, *NGO Laws: Malawi, Mozambique, Namibia, South Africa and Tanzania*, at http://hrw.org/backgrounder/africa/zimbabwe/2004/12/6.htm.

hired. . . ."[30] Under these already difficult circumstances it may be difficult or impossible to convince the government to loosen those limits for new and separate affiliates of American charitable organizations.

53. The burdens of operations are particularly problematic in Mozambique. Securing appropriate clearances for import of vehicles and office equipment, and securing office space, telephone and Internet access and other necessary services can take months or longer. Accomplishing these tasks twice, for separate groups related to the same American organization, is likely to be exceptionally difficult and spark suspicion that cheating, fraud, illicit or anti-government activities are at work.[31]

54. Given the already heightened suspicions of the Mozambican authorities toward foreign charitable and nonprofit organizations, the authorities in Maputo are likely to be highly suspicious that attempts to establish parallel related organizations in Mozambique are being undertaken to evade tax or customs requirements, to engage in advocacy or political activities. The government agencies most likely to hold and perhaps act on these suspicions include the Ministry of Interior, Ministry of Planning and Finance, Ministry of Foreign Affairs

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[30] Human Rights Watch, *NGO Laws: Malawi, Mozambique, Namibia, South Africa and Tanzania*, at http://hrw.org/backgrounder/africa/zimbabwe/2004/12/6.htm.

[31] For multiple examples of these difficulties in Mozambique in the customs and import context as recently as 2007, see International Federation of Red Cross and Red Crescent Societies (IFRC), *Law and Legal Issues in International Disaster Response: A Desk Study* (2007), at 99, 100, 109, 112 (attached in relevant part as Exhibit B hereto).

and Cooperation, and government bodies responsible for security and intelligence.

55. The establishment of new and separate related organizations of American charitable organizations in Mozambique would also almost certainly cause significant problems and long delays in the receipt of funds from abroad for charitable work in Mozambique.

56. For each of these reasons, requiring American charitable and nonprofit organizations to establish new and separate groups in Mozambique, under a system in which even the normal, seemingly uncontroversial establishment of a single charitable affiliate can cause enormous burdens and delays, is likely to be exceptionally burdensome to the American organizations.

D. Ethiopia

57. The situation for American charitable organizations seeking to register and work in Ethiopia is already very difficult, as it is for Ethiopian organizations seeking to carry out autonomous civil society activities. The U.S. State Department has reported in recent years on government "limitations on freedom of association."[32] In such an environment, requiring American organizations to entirely double their establishment and registration activities would be both very difficult and makes no sense, mandating significant new establishment, registration and operating expenses while causing govern-

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[32] See the Ethiopia report in U.S. Department of State, *Country Reports on Human Rights Practices 2005* (March 2006), at www.state.gov/g/drl/rls/hrrpt/2005/61569.htm; U.S. Department of State, *Country Reports on Human Rights Practices 2006* (March 2007), www.state.gov/g/drl/rls/hrrpt/2006/78734.htm.

ment suspicions of the motivations behind dual organizational arrangements.

58. Since the Ethiopian elections in 2005, the Ethiopian civil society and nongovernmental sector has been "fragmented and weakened."[33] In recent years, the U.S. State Department as well as reputed American and international organizations such as Freedom House (U.S.), the Christian Relief and Development Agency (CRDA) and the International Center for Not-for-Profit Law (U.S.), have reported increasing interference with the registration of charitable and nonprofit organizations.

59. The International Center for Not-for-Profit Law reports, for example, that in Ethiopia, "regulations governing the registration process are vague and leave great discretion to the registration officials. As a result, CSOs [civil society organizations] have difficulty registering—they are sometimes denied registration and other times experience long delays or repeated requests for information."[34] The Christian Research and Development Agency (CRDA), an international aid agency working actively in Ethiopia, reported in a lengthy study of the operating environment for nonprofit and charitable organizations in Ethiopia that the "registration pro-

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[33] Christian Relief and Development Agency, *Assessment of the Operating Environment for CSO/NGOs in Ethiopia* (December 2006), at www.crdaethiopia.org, p. 14.

[34] International Center for Not-for-Profit Law, Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations, 8:4 *International Journal of Not-for-Profit Law* (August 2006), at www.ijnl.org.

cess [is] onerous, subjective and open for abuse and provides ample room for denial of registration."[35]

60. The problems, in fact, well exceed registration. The Christian Relief and Development Association reported as recently as December 2006, for example, that "[i]n Ethiopia . . . the mandate of the government . . . has gone beyond registration as far as closing down organizations, dictating what goes or does not go into an organization's Memo of Association . . . thus contravening the very principle of 'freedom of associational life'. There is also concern that . . . NGOs/CSOs will soon have to first present project documents from regions prior to seeking basic agreements. . . . In other words, Government now wants to know what precisely NGOs/CSOs want to do before providing legal certificates. Furthermore, there was strong feeling that the government is monitoring the 'political' actions of NGOs /CSOs."[36]

61. The U.S. State Department has also reported on restrictions on foreign NGO electoral observers, domestic human rights organizations, and foreign religious workers, among other groups. The State Department states: "The government generally was distrustful and wary of domestic human rights groups and some international observers. After the November [2005] protests the government restricted human rights groups from visiting or investigating detention camps. In April

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[35] Christian Relief and Development Agency, *Assessment of the Operating Environment for CSO/NGOs in Ethiopia* (December 2006), at www.crdaethiopia.org, p. 14.

[36] Christian Relief and Development Agency, *Assessment of the Operating Environment for CSO/NGOs in Ethiopia* (December 2006), at www.crdaethiopia.org, p. 12.

[2005] the government expelled representatives of several foreign-based NGOs conducting electoral work."[37] The situation remained problematic when the most recent State Department human rights report on Ethiopia was issued in March 2007: "The government generally was distrustful and wary of domestic human rights groups and some international observers. NGOs continued to complain of restrictions on their importation of published materials and complained that they were prevented from bringing foreigner visitors into the country."[38] In both 2006 and 2007, the State Department reported that the Ethiopian government also restricted visas for foreign religious organizations.[39]

62. Representatives of foreign charitable organizations have been caught up in the government's repression of the charitable and nonprofit sector. In 2007, for example, the director of the policy department at ActionAid International Ethiopia, the Ethiopian branch of the major international charitable agency ActionAid was put on trial for treason in Addis Ababa, along with another defendant who headed the Organization for Social Justice in Ethiopia, which had conducted election monitoring. The arrests of these nonprofit personnel

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[37] *See* the Ethiopia report in U.S. Department of State, *Country Reports on Human Rights Practices 2005* (March 2006), at www.state.gov/g/drl/rls/hrrpt/2005/61569.htm.

[38] *See* the Ethiopia report in U.S. Department of State, *Country Reports on Human Rights Practices 2006* (March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78734.htm.

[39] *See* the Ethiopia report in U.S. Department of State, *Country Reports on Human Rights Practices 2005* (March 2006), at www.state.gov/g/drl/rls/hrrpt/2005/61569.htm; U.S. Department of State, *Country Reports on Human Rights Practices 2006* (March 2007), at www.state.gov/g/drl/rls/hrrpt/2006/78734.htm.

and over 120 others had earlier prompted international donors, including the World Bank and the European Union, to threaten to withhold $375 million in desperately needed foreign aid for Ethiopia.[40]

63. Under these circumstances in which the charitable, nonprofit and civil society sector already faces substantial pressure in a country in which the effective and efficient provision of aid is critical, requiring American charitable organizations to establish new and separate organizations would be a highly burdensome and entirely counter-productive task. The creation of such related organizations would mandate significant new establishment, registration and operating expenses while causing government suspicions of the motivations behind dual organizational arrangements, and siphoning urgently needed resources away from addressing Ethiopia's immense problems of poverty, food insecurity, and conflict.

E. Peru

64. In Peru, requiring American charitable organizations to establish new and separate organizations would be a highly burdensome task in a situation where the charitable and nonprofit sector is already under significant pressure.

65. Freedom House reported in 2007 that "[c]ooperation between the state and NGOs has diminished significantly under the [current] government, which is perceived as wary of NGO motivations. Given the lack of a coherent opposition in congress, NGOs are seen by the government almost as opposition political parties. This

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[40] International Center for Civil Society Law Newsletter, January 2006 and July 2007, at www.iccsl.org.

puts them in a difficult position: the more vigorously they oppose government actions, the more the government view that they are political entities is validated."[41]

66. These suspicions and harassment took a more ominous form in December 2006, when "final amendments were passed to a new law that imposed new registration rules on all NGOs operating in the country. The law [Ley No. 28875] . . . requires that all NGOs register with [the Peruvian Agency for International Cooperation] and divulge details of the provenance and intended use of all donated funds. For money channeled through [the Agency], the agency—which as an arm of the foreign affairs ministry is an executive branch institution—will have the ability to "prioritize" spending in line with national development goals, as well as impose sanctions on organizations that are deemed noncompliant with the new regulations."[42] This new law was perceived as a direct threat by the Peruvian nonprofit and charitable sector.[43]

67. In such an environment, requiring American organizations to entirely double their establishment and registration activities would be both very difficult and makes no sense, mandating significant new establishment, registration and operating expenses while causing government suspicions of the motivations behind dual organizational arrangements, and siphoning urgently

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[41] Freedom House, *Countries at the Crossroads 2007* (Peru), at www.freedomhouse.org.

[42] *Id.*

[43] *Id.* The law was challenged before the Peruvian Constitutional Court, which held parts of it unconstitutional on August 29, 2007. International Center for Civil Society Law Newsletter, October 2007, at www.iccsl.org.

needed resources away from addressing Peru's continuing issues of poverty, food insecurity, and conflict.

IV. Conclusion

68. In summary, the government's Guidelines impose very substantial burdens on American charitable organizations working abroad in each of these areas. The Guidelines do not allow American charitable organizations working abroad adequate alternative channels for protected expression because it is simply too burdensome for non-profit organizations to create, establish, register, and operate new related entities everywhere they work overseas.

Executed on Feb. 5, 2008
Iowa City, Iowa

/s/ MARK SIDEL
MARK SIDEL

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Supreme Court, U.S.
FILED
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No. 12-10

In the Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,
PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY
INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. 7631(f), which requires organizations to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are the United States Agency for International Development; Rajiv Shah, Administrator of the United States Agency for International Development; the United States Department of Health and Human Services; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; the United States Centers for Disease Control and Prevention; and Thomas R. Frieden, the Director of the United States Centers for Disease Control and Prevention.

Respondents are Alliance for Open Society International, Inc., Pathfinder International, Global Health Council, and InterAction.

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22 U.S.C. 7611(a)(5) (Supp. V 2011)) 3
22 U.S.C. 7611(a)(7) (Supp. V 2011) 3
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In the Supreme Court of the United States

No. 12-10

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL., PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-96a) is reported at 651 F.3d 218. The order of the court of appeals denying rehearing (Pet. App. 97a-111a) is reported at 678 F.3d 127. The relevant orders of the district court (Pet. App. 112a-219a, 220a-252a) are reported at 430 F. Supp. 2d 222 and 570 F. Supp. 2d 533.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on February 2, 2012 (Pet. App. 97a-98a). On April 20, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 2, 2012, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." Relevant statutory and regulatory provisions are reproduced in the appendix to the petition. Pet. App. 253a-340a.[1]

STATEMENT

1. a. This case presents a constitutional challenge to a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 22 U.S.C. 7601 *et seq.* That Act responded to Congress's finding that the global spread of HIV/AIDS had infected more than 65 million people worldwide, killing 25 million and leaving more than 14 million orphaned children. See 22 U.S.C. 7601(2). Congress found that the spread of HIV/AIDS had assumed "pandemic proportions, * * * leaving an unprecedented path of death and devastation." 22 U.S.C. 7601(1). As of 2003, HIV/AIDS was the fourth-highest cause of death across the globe, and the President regarded addressing it as "one of the most urgent needs of the modern world." *Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, Pub. Papers 541, 542 (May 27, 2003).

The Leadership Act is the primary component of the United States' effort to fight HIV/AIDS abroad. Under

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[1] The last document in Appendix G to the petition is partially misnumbered. The final 24 pages should be numbered as 317a to 340a (rather than as 313a to 336a). Those pages are referred to herein as if they were correctly numbered.

that Act, Congress has authorized the appropriation of billions of dollars for the President to establish "a comprehensive, integrated, [five]-year strategy to expand and improve efforts to combat global HIV/AIDS." 22 U.S.C. 7611(a) (Supp. V 2011).[2] That comprehensive strategy must be designed to attack HIV/AIDS in multiple ways. Among other things, the strategy must include plans for providing care to those infected with HIV/AIDS; preventing further transmission of HIV infections, particularly among "families with children (including the prevention of mother-to-child transmission), women, young people, orphans, and vulnerable children"; expanding efforts with other public and private entities to improve HIV/AIDS prevention and treatment programs; and accelerating research on prevention methods. 22 U.S.C. 7611(a)(4), (5), (7), (9), (10) and (25) (Supp. V 2011); see 22 U.S.C. 7603 (Supp. V 2011) (describing Congress's goals in the Leadership Act).

b. As part of the Act's comprehensive approach to fighting HIV/AIDS, Congress paid close attention to the underlying social conditions that foster its spread. For instance, Congress found that "[w]omen are four times more vulnerable to infection than are men and are becoming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS." 22 U.S.C. 7601(3)(B). Congress noted that "[w]omen and children who are refugees or are internal-

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[2] Congress authorized $15 billion for the effort to combat HIV/AIDS, malaria, and tuberculosis for the period from 2004 to 2008, see 22 U.S.C. 7671(a) (2006), and it has since authorized an additional $48 billion for the period from 2008 to 2013, see 22 U.S.C. 7671(a) (Supp. V 2011).

ly displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection." 22 U.S.C. 7601(3)(C); see 22 U.S.C. 7601(3)(A) ("At the end of 2002, * * * more than 3,200,000 [of the individuals infected with HIV/AIDS worldwide] were children under the age of 15 and more than 19,200,000 were women.").

To prevent the transmission of HIV/AIDS among those high-risk groups, Congress addressed the conditions and behaviors it believed were responsible for placing them at risk. See 22 U.S.C. 2151b-2(d)(1)(A) (Supp. V 2011) (directing that HIV/AIDS funding be used to "help[] individuals avoid behaviors that place them at risk of HIV infection"). Specifically, the Leadership Act "make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts," including by promoting abstinence and monogamy, encouraging the proper use of condoms, and supporting drug prevention and treatment programs. 22 U.S.C. 7611(a)(12)(A), (B) and (E) (Supp. V 2011). As especially relevant here, the Act requires "educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (Supp. V 2011).[3]

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[3] In prioritizing the reduction of behavioral risks for HIV/AIDS, Congress invoked the success of the HIV/AIDS programs implemented by Uganda between 1991 and 2000. See 22 U.S.C. 7601(20). Uganda had developed a balanced approach to HIV/AIDS prevention, urging citizens to abstain from premarital sex, to be faithful to

As part of its emphasis on addressing behaviors that create a particular risk of HIV infection, Congress made a considered decision to pursue the reduction of prostitution and sex trafficking, particularly in developing countries where most of the federally funded programs at issue are carried out. In enacting the Leadership Act, Congress found that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). In Cambodia, for example, "as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia." *Ibid.* Among female prostitutes in certain areas of Thailand and India, the rates of HIV/AIDS infection were even higher. See *Trafficking in Women & Children in East Asia & Beyond: A Review of U.S. Policy, Hearing Before the Subcomm. on East Asian & Pacific Affairs of the Senate Comm. on Foreign Relations*, 108th Cong., 1st Sess. 18 (2003) (statement of Sen. Brownback, Subcommittee Chairman). Moreover, prostitution fuels the demand for international sex trafficking of women and children. See *id.* at 18-19.[4]

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sexual partners, and to use condoms. See 22 U.S.C. 7601(20)(C). Congress directed that similar messages be promoted to combat HIV/AIDS worldwide. See 22 U.S.C. 2151b-2(d)(1)(A), 7611(a)(12) (Supp. V 2011).

[4] In enacting the Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. 7101 *et seq.*, Congress sought to eliminate the global criminal trade in persons, in which 700,000 individuals are trafficked each year into forced prostitution and other forms of modern-day slavery. See 22 U.S.C. 7101(a), (b)(1)-(3) and (8). Like the Leadership Act, the TVPA (as amended in 2003) prohibits the use of federal funding "to promote, support, or advocate the legalization or practice of prostitution," and further provides that federal funding to

2. Pursuant to the Leadership Act, the United States has provided billions of dollars to nongovernmental organizations so that they can assist in the fight against the HIV/AIDS epidemic overseas. See 22 U.S.C. 2151b-2(c) (Supp. V 2011); 22 U.S.C. 7671 (2006 & Supp. V 2011). In order to ensure that those funds are spent in accordance with the Act's objectives, Congress has placed two limitations on the use of the funds. First, Section 7631(e) of the Act provides that no funds made available under the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. 7631(e). Second, Section 7631(f)—the provision at issue in this case—provides that no funds made available under the Act "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). That statutory restriction does not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; or to any United Nations agency. See *ibid.*

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing programs and services under the Leadership Act. They have implemented Section 7631(f)'s funding eligibility condition in similar ways. HHS has promulgated a regulation that, in its current form, requires the recipient of any grant, cooperative agreement, or other funding arrangement to

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rescue and assist the victims of severe forms of trafficking will be provided only to organizations that state that they do not "promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C. 7110(g)(1)-(2).

agree in the award document that it is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. 89.1. Likewise, USAID has issued an Acquisition and Assistance Policy Directive that similarly requires the recipient of any HIV/AIDS-related contract, grant, or cooperative agreement under the Leadership Act to agree in the award document that it is opposed to prostitution and sex trafficking. See Pet. App. 299a-340a.

3. Respondents Alliance for Open Society International, Inc. (AOSI) and Pathfinder International (Pathfinder) are nongovernmental organizations that receive funding for overseas HIV/AIDS prevention programs under the Leadership Act. In 2005, they brought suit against HHS, USAID, and other federal agencies and officials, alleging that Section 7631(f) violates the First Amendment by conditioning their receipt of Leadership Act funds on the affirmative adoption of a policy opposing prostitution. Respondents did not challenge the portion of Section 7631(f) that conditions their receipt of funding on having a policy opposing sex trafficking. Respondents also did not challenge the complementary condition in Section 7631(e) barring the use of funds under the Act "to promote or advocate the legalization or practice of prostitution or sex trafficking."

In 2006, the district court granted respondents AOSI and Pathfinder preliminary injunctive relief. Pet. App. 112a-219a. Applying heightened scrutiny, *id.* at 164a, 196a, the court held that Section 7631(f) is not narrowly tailored to Congress's interest in eradicating prostitution as part of its strategy to combat HIV/AIDS, imposes a viewpoint-based restriction on respondents' use of funds, and impermissibly compels private speech. *Id.* at

198a-214a; see *id.* at 214a ("Because the provision as construed by [petitioners] cannot survive heightened scrutiny, and also impermissibly discriminates based on viewpoint and compels speech, it violates the First Amendment.").

While the government's appeal of that decision was pending, HHS and USAID developed guidelines that allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). Those guidelines permit an organization to remain eligible for funding and yet be affiliated with a group that "engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," so long as the organization that receives funding has "objective integrity and independence from [the] affiliated organization." 45 C.F.R. 89.3; see Pet. App. 297a, 309a. Whether a recipient is independent from affiliated organizations depends on the totality of the circumstances, including such factors as whether the groups are legally distinct and maintain separate personnel, records, facilities, and forms of identification. See 45 C.F.R. 89.3(b); Pet. App. 298a, 309a-310a.

In light of the new guidelines, the court of appeals remanded for the district court to determine whether preliminary injunctive relief continued to be appropriate. Pet. App. 224a. On remand, the district court held that the newly issued guidelines did not affect its previous decision. *Id.* at 241a-250a. The district court also extended injunctive relief to two new plaintiffs named in an amended complaint, respondents Global Health Council (GHC) and InterAction, which are associations of nongovernmental organizations that collectively include most of the groups based in the United States that

receive federal funding under the Leadership Act. *Id.* at 227a, 251a-252a. The government again appealed. While that second appeal was pending, HHS and USAID promulgated further guidance that allows funding recipients additional flexibility in partnering with affiliates not subject to Section 7631(f). *Id.* at 10a-11a.

4. a. A divided panel of the court of appeals affirmed. Pet. App. 1a-96a. The court held that Section 7631(f) "likely violates the First Amendment by impermissibly compelling [respondents] to espouse the government's viewpoint on prostitution." *Id.* at 17a. According to the court, Section 7631(f) "falls well beyond * * * permissible funding conditions," because "[it] does not merely restrict recipients from engaging in certain expression * * * but pushes considerably further and mandates that recipients affirmatively *say* something." *Id.* at 25a. The court also observed that Section 7631(f) is impermissibly "viewpoint-based, because it requires recipients to take the government's side on a particular issue." *Id.* at 27a. The court recognized that the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program," but only where "the government's program *is*, in effect, its message." *Id.* at 32a. Here, the court concluded, the purpose of the Leadership Act is to fight HIV/AIDS, and in its view advocacy against prostitution is not central to that mission. *Id.* at 32a-34a. The court rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. *Id.* at 35a-36a.

b. Judge Straub dissented on the ground that Section 7631(f) "neither imposes a coercive penalty on protected

First Amendment rights nor discriminates in a way aimed at the suppression of any ideas." Pet. App. 37a. A funding condition "cabined to the federal subsidy program to which it is attached" has no "coercive force" even if it "limit[s] or affect[s] speech," Judge Straub reasoned, because potential recipients "can simply choose not to accept the funds." *Id.* at 55a-56a. After surveying this Court's decisions addressing conditions on government subsidies, Judge Straub reasoned that those decisions allow the government to "insist[] that public funds be spent for the purposes for which they were authorized." *Id.* at 73a (brackets in original) (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991)). In Judge Straub's view, Section 7631(f) "does precisely that" because Congress "only authorized federal funds for organizations that shared its desire to affirmatively reduce HIV/AIDS behavioral risks, including its policy of eradicating prostitution." *Id.* at 74a. Finally, Judge Straub observed, the agencies' guidelines leave funding recipients able "to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds." *Id.* at 77a.

5. The court of appeals denied rehearing en banc, over the dissent of three judges and with the concurrence of one other judge. Pet. App. 97a-111a. Judge Cabranes (joined by Judges Raggi and Livingston) concluded that en banc review was appropriate because "[t]he question presented is indisputably one of exceptional importance," *id.* at 98a; "the panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge," *id.* at 103a (citing *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (D.C. Cir. 2007)); and "[t]he decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirma-

tive' and 'negative' speech restrictions," *id.* at 99a. According to Judge Cabranes, "it is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention." *Id.* at 103a. Judge Pooler issued an opinion concurring in the denial of rehearing en banc. *Id.* at 106a-111a.

SUMMARY OF ARGUMENT

A. The condition at issue in Section 7631(f) of the Leadership Act—*i.e.*, that recipients of federal funds under the Act have a policy opposing prostitution and sex trafficking—is an exercise of Congress's spending power. When exercising that power, Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. Private entities that do not wish to comply with those conditions may avoid them simply by declining federal funds. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991). The court of appeals nevertheless concluded that the funding condition in this case is impermissible, because the First Amendment independently bars the government from requiring recipients of Leadership Act funds to adopt its position on prostitution and sex trafficking. That conclusion was fundamentally mistaken. Respondents have been given a voluntary choice: whether to assist in carrying out a comprehensive governmental HIV/AIDS strategy that, among other things, aims to reduce behaviors like prostitution and sex trafficking that facilitate the disease's spread. Offering private entities that type of choice does not violate the First Amendment.

B. This Court has recognized in *Rust* and other cases that the government may enlist the assistance of private entities or organizations to convey its chosen message. When it does so, the government may take legitimate

steps to ensure that its message is effectively communicated, and not undermined, by the recipient. Here, Congress made plain in the Act that a comprehensive strategy to address HIV/AIDS should attempt to reduce its underlying causes, including prostitution and sex trafficking. Congress also decided that it would make little sense for the government to direct billions of dollars toward that end, and yet to engage as partners in that effort organizations that are neutral toward or that even affirmatively disagree with the government's decision to oppose those practices. See *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762-763 (D.C. Cir. 2007). Respondents and the court of appeals have attempted to dismiss Section 7631(f)'s policy condition as inconsequential, but that misconceives both the Act and the appropriate judicial role. It is for Congress to decide when a condition on the receipt of federal funds is integral to a funding program, and it has done so here. See *Rust*, 500 U.S. at 193.

C. The court of appeals reasoned that the Act's policy requirement is impermissible because it affirmatively compels speech by the recipients of the Act's funds. This Court has never held, however, that it matters whether conditions on the receipt of federal funding compel speech or silence. To the contrary, the Court has held that the distinction is without constitutional significance in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). There is no reason, then, that the distinction should be dispositive in the context of funding conditions, where prospective recipients are not in any sense compelled to speak because they may avoid the conditions altogether simply by declining to accept the federal funds at issue. Accordingly,

as the dissenters below explained, the reasoning of this Court's decisions on funding conditions lends no support to the court of appeals' novel affirmative-negative dichotomy.

D. To be sure, Congress's authority under the Spending Clause is not without First Amendment limits. This Court has indicated that a funding condition is subject to heightened scrutiny when it is aimed at suppressing dangerous ideas or disfavored viewpoints. But respondents have not argued, and the court of appeals did not conclude, that Section 7631(f)'s policy requirement is aimed at suppressing expression by private HIV/AIDS relief organizations. As a result, this is not a case in which it is difficult to determine whether a particular condition is designed permissibly to enlist private entities in communicating a governmental message or instead impermissibly to coerce private entities into refraining from expression on a disfavored topic.

E. Respondents treat Section 7631(f) as though it were a direct regulation of speech rather than a condition on the receipt of federal funds. They rely on cases analyzing direct regulations that compel speech or discriminate on the basis of viewpoint, without any acknowledgment that the government may allocate funding according to criteria that would be impermissible were direct regulation of speech at stake. See, *e.g.*, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998). That distinction is critical: providing funds to organizations that will faithfully promote Congress's program and message is a far cry from denying citizens access to generally available public benefits. Respondents simply misconstrue First Amendment doctrine by claiming that they have been compelled to do anything: they must have a particular policy only be-

cause they chose to accept federal funds, not as a result of any legal mandate.

F. The agencies' affiliation guidelines obviate any conceivable constitutional difficulty. Those guidelines allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). This Court has repeatedly recognized the value of that type of affiliate structure. It is no answer to say (as respondents do) that the guidelines here are different because they require separate entities rather than separate programs. Either way, respondents may cabin the effects of Section 7631(f) to the scope of the federally funded programs at issue. Nor is it any answer to say (as the court of appeals did) that even if Section 7631(f) does not infringe respondents' speech rights, it infringes their *affiliates'* speech rights. By allowing respondents to form special-purpose affiliates, the agencies' guidelines confine any burden that might otherwise exist on the ability to communicate contrary views on prostitution and sex trafficking.

G. Finally, respondents argue that the policy condition is unconstitutionally vague. That argument is neither properly presented nor sound. The lower courts did not address it, and respondents may pursue it on remand. Moreover, respondents' vagueness challenge is not even to the statute—which is what the lower courts enjoined—but to the agencies' guidelines. Their vagueness claim thus cannot supply a basis for the judgment under review. In any event, the claim lacks merit: respondents cannot show that the guidelines are unclear, let alone so unclear that this Court should sustain respondents' facial, preenforcement challenge to them.

ARGUMENT

THE LEADERSHIP ACT'S FUNDING CONDITION IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE SPENDING CLAUSE

The Leadership Act, 22 U.S.C. 7601 *et seq.*, authorizes billions of dollars in federal aid to combat the worldwide HIV/AIDS epidemic. The Act calls for a comprehensive strategy that encompasses the provision of care to infected persons as well as the prevention of further transmission. Accordingly, Congress authorized agencies to provide funds to private HIV/AIDS relief organizations for foreign programs in a manner that seeks not only to treat the disease itself, but also to reduce the practices that foster its spread. As part of that strategy, the Act requires funding recipients to "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). It does so to ensure that its partners in the fight against HIV/AIDS further Congress's chosen program and comport with Congress's determination that participating in the sex trade or sex trafficking carries serious risks for women, men, and children across the globe. The court of appeals erred in invalidating that condition on the acceptance of federal funds, and in thereby undermining the government's ability to implement the comprehensive approach chosen by Congress.

Congress has broad authority under the Spending Clause to attach conditions to the receipt of federal funds in order to further its policy objectives. It has exercised that authority here to ensure that recipients, in performing work under the Leadership Act program, effectively adhere to the government's own policy under the Act of opposing prostitution and sex trafficking in order to reduce the spread of HIV/AIDS. Respondents

have not argued that the policy requirement is designed to suppress private speech in favor of prostitution and sex trafficking, and indeed respondents do not contend that they want to promote those practices. Respondents nonetheless challenge Section 7631(f)'s funding condition on the ground that it impermissibly compels speech. That argument ignores the critical distinction in this Court's cases between funding conditions and direct regulations of speech. Respondents face a choice whether to accept federal funding, but they do not face any form of legal compulsion. In any event, the agencies' affiliation guidelines cure any conceivable constitutional difficulty.

A. Congress Has Wide Latitude To Attach Conditions To The Receipt Of Federal Funds In Order To Further Broad Policy Objectives Of Federal Programs

1. The condition on the receipt of federal funds at issue in the Leadership Act—*i.e.*, that recipients have a policy opposing prostitution and sex trafficking—is not an exercise of Congress's regulatory authority over private conduct. It is instead an exercise of Congress's authority under the Spending Clause to "provide for the * * * general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. Congress has done so by specifying the purposes for which federal assistance to private organizations implementing federal programs may be used and the manner in which the programs' objectives will be pursued. As such, the Leadership Act's funding condition attaches only when a private organization voluntarily chooses to participate in the government's program by applying for and accepting federal assistance for the treatment and prevention of HIV/AIDS. Because Section 7631(f) is a condition on the receipt of federal assistance rather than a regulato-

ry restriction, this Court's Spending Clause cases provide the appropriate framework for assessing its constitutionality. See *United States* v. *American Library Ass'n, Inc.*, 539 U.S. 194, 203 n.2 (2003) (plurality opinion).

Under those cases, Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives. See *American Library Ass'n*, 539 U.S. at 203 (plurality opinion); *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987); *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). The constitutional limitations on Congress's exercise of the spending power "are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 209; see *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."). Thus, "Congress may attach conditions on the receipt of federal funds" to accomplish particular objectives, even if Congress would be constitutionally barred from imposing the same conditions through direct government regulation. *Dole*, 483 U.S. at 206–207.

When Congress attaches conditions on the receipt of federal funds, an organization that does not wish to comply with the conditions may avoid them by declining to apply for and accept the funds. See, *e.g.*, *American Library Ass'n*, 539 U.S. at 212 (plurality opinion); *Rust* v. *Sullivan*, 500 U.S. 173, 199 n.5 (1991) ("[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy."); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) ("[The recipient] may terminate its participation in the [federal] program and thus avoid the

requirements.") (internal citation omitted); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983) (opinion of White, J.) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: [the] grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt."); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) ("[I]n return for federal funds, [recipients] agree to comply with federally imposed conditions.").

2. Congress's discretion to impose conditions on the receipt of federal funds is not without limits. Congress may not place a condition on federal funds that restricts claimants' expression if the condition would "have the effect of coercing the claimants to refrain from the proscribed speech." *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958); cf. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (*FAIR*) ("This case does not require us to determine when a condition placed on university funding goes beyond [a] 'reasonable' choice * * * and becomes an unconstitutional condition."). The court of appeals concluded that Section 7631(f) transgresses that limitation because it compels recipients to adopt the government's position on prostitution and sex trafficking. See Pet. App. 18a-19a, 25a.

That rationale is fundamentally mistaken. In the funding context, as explained below in Part B, this Court has repeatedly held that the government may disburse public funds to private entities to advance a governmental program or convey a governmental message. When it does so, the government may take appropriate steps to ensure that its program is not undermined and its message is not distorted by private partners. Those private entities then face a voluntary choice: whether to

accept federal funds subject to the condition or to decline federal assistance. That choice simply does not present any risk of the kind of coercion that the Court identified in *Speiser*, *supra*. Here, respondents could choose whether to participate in the comprehensive HIV/AIDS strategy established by Congress that, among other things, aims to reduce behavioral risks like prostitution and sex trafficking that facilitate the disease's spread. This Court has consistently made clear that offering private entities that type of reasonable choice does not violate the First Amendment.

B. Section 7631(f) Ensures That The Leadership Act's Policy Opposing Prostitution And Sex Trafficking Is Effectively Implemented By Funding Recipients

1. The policy condition is an appropriate step to ensure that the Act's policy opposing prostitution and sex trafficking is not distorted by recipients

a. In enacting the Leadership Act, Congress recognized that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23); see p. 5, *supra*. Congress noted, for instance, the alarming rate of HIV infection among prostitutes in Cambodia and also the high rate of increase of infection generally in that country. See 22 U.S.C. 7601(23). Congress therefore concluded that its comprehensive strategy to address HIV/AIDS should include measures to reduce prostitution and sex trafficking in countries where the federally funded programs at issue are provided. See *ibid.* (finding that because prostitution, sex trafficking, and sexual violence contribute to the spread of HIV/AIDS and degrade women and children, "it should be the policy of

the United States to eradicate such practices"). Accordingly, the Act directs the President to make "the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." 22 U.S.C. 7611(a)(12) (Supp. V 2011).

The government is entitled to take measures to ensure that private organizations receiving federal funds to perform services under the Leadership Act adhere to its goal of eradicating prostitution and sex trafficking. As the District of Columbia Circuit has explained, the government may "use criteria to ensure that its message [in the Act] is conveyed in an efficient and effective fashion." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762 (2007) (*DKT*). Congress judged that it would make little sense for the government to provide billions of dollars for the treatment and prevention of HIV/AIDS, including for the reduction of prostitution and sex trafficking, and yet to engage as partners in that effort organizations that assume a posture of indifference toward or that even affirmatively oppose efforts to eliminate those practices. See *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 670 (1989) (noting the government's "compelling interest" in preventing its efforts from being undermined by employees' "indifference to [their agency's] basic mission" or "active complicity" against it).

Congress determined that the effectiveness of the government's program and message would be substantially undermined if the same organizations hired to further the program's goals and to communicate that message as called for in their provision of HIV/AIDS programs and services, could at the same time advance an opposite position simply by drawing on private funds. Indeed, the overall thrust of the Leadership Act is to ensure that the United States, in cooperation with foreign governments and many different types of nongov-

ernmental organizations, develops a unified strategy to attack the HIV/AIDS pandemic. See, *e.g.*, 22 U.S.C. 7601(18), (19), (21) and (22), 7621; 22 U.S.C. 7611(a) (Supp. V 2011). Congress therefore reasonably decided that recipients should be required to make a commitment to the government that they will further central objectives of the very program under which they seek and accept federal funds. For those reasons, Congress included in the Leadership Act not only the unchallenged prohibition against the use of program funds "to promote or advocate the legalization or practice of prostitution or sex trafficking," 22 U.S.C. 7631(e), but also the complementary limitation that no funds made available under the Act "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," 22 U.S.C. 7631(f).

b. This Court has recognized that although the government may act or speak through its own representatives, officers, or employees, it may also enlist the assistance of private entities or organizations to carry out governmental programs and convey its chosen message. See, *e.g.*, *Rust*, 500 U.S. at 193. When the government's program entails communication, and the government "is the speaker or * * * it enlists private entities to convey its own message," the government may "regulate the content of what is or is not expressed." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see *ibid.* ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). For that reason, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its

message is neither garbled nor distorted by the grantee." *Ibid.*; see *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances * * * in which the government use[s] private speakers to transmit specific information pertaining to its own program.") (internal quotation marks and citation omitted).

Here, Section 7631(f), as implemented through the HHS regulations and USAID guidance, requires the funding recipient to agree in the award document that it opposes prostitution and sex trafficking. That representation serves to secure a commitment by the recipient that it will adhere to the government's policy of reducing and eliminating those practices—in its conduct and, as necessary, in its expression. The recipient's stated policy of opposing prostitution and sex trafficking also serves to secure a commitment that it will not undermine the government's policy goals by acting inconsistently with those goals. At the same time, Section 7631(f) does not in itself require a recipient to affirmatively volunteer to others, such as individual beneficiaries of services, an opposition to prostitution and sex trafficking. Thus, in both the purposes that it serves and the manner in which it functions, Section 7631(f) is not materially different from a condition that a recipient of federal funds agree with some other governmental policy associated with a funding program—*e.g.*, a policy opposing racial discrimination.

In light of Congress's findings, Section 7631(f)'s funding condition is plainly a "legitimate and appropriate" means to ensure that the government's goals are advanced and its message communicated as appropriate wherever the Act's funds are spent. *Rosenberger*, 515 U.S. at 833. Congress reasonably could view the se-

curing of an advance commitment from recipients as especially necessary in light of the challenges associated with monitoring the way in which private organizations provide HIV/AIDS programs and services throughout the world. Policies opposing prostitution and sex trafficking help to guarantee that the organizations receiving Leadership Act funds carry out their overseas operations in a manner that does not frustrate or undermine Congress's goals. And because the Leadership Act addresses "matters with foreign policy implications," deference to Congress's choice of means is all the more warranted. *DKT*, 477 F.3d at 762; cf. *DKT Mem'l Fund Ltd.* v. *Agency for Int'l Dev.*, 887 F.2d 275, 291 (D.C. Cir. 1989) ("[A] nation speaks in foreign affairs not only by the express messages that it sends, but by its choice of foreign entities with whom it will associate.").

c. In contrast to the decision below, the District of Columbia Circuit correctly applied this Court's precedents in its decision in *DKT*. That case also involved a First Amendment challenge to Section 7631(f) brought by a private organization, DKT International, Inc., that provided HIV/AIDS prevention programming in foreign countries in part with Leadership Act funds. See 477 F.3d at 760-761. DKT refused to adopt a policy opposing prostitution because, in its view, "this might result in stigmatizing and alienating many of the people most vulnerable to HIV/AIDS—the sex workers." *Id.* at 761 (internal quotation marks omitted). DKT argued that Section 7631(f) was unconstitutional for the same reason respondents have asserted: *i.e.*, that "it forces DKT to convey a message with which it does not necessarily agree." *Ibid.*

The District of Columbia Circuit rejected that argument. The court recognized that the government "may

hire private agents to speak for it," *DKT*, 477 F.3d at 761 (citing *Rust*, 500 U.S. at 173), and in communicating its message through private entities "the government can—and often must—discriminate on the basis of viewpoint," *ibid.* (citing *Rosenberger*, 515 U.S. at 833). The court observed that, under the Leadership Act, one central "objective is to eradicate HIV/AIDS" and "[o]ne of the means of accomplishing this objective is for the United States to speak out against legalizing prostitution in other countries." *Ibid.* As the court explained, "[t]he Act's strategy in combating HIV/AIDS is not merely to ship condoms and medicine to regions where the disease is rampant," but also to "foster[] behavioral change, *see, e.g.*, 22 U.S.C. § 7601(22)(E), and spread[] 'educational messages,' *id.* § 7611(a)(4)." *Ibid.* The court reasoned that "[s]pending money to convince people at risk of HIV/AIDS to change their behavior is necessarily a message," *ibid.*, and funding recipients reasonably can be expected not to undermine that message.

The District of Columbia Circuit thus rejected DKT's contention that the Leadership Act is simply "a program to encourage private speech." *DKT*, 477 F.3d at 762 (quoting *Rosenberger*, 515 U.S. at 833). Rather, the court held, the government is "us[ing] private speakers to transmit specific information pertaining to its own program," *ibid.* (quoting *Rosenberger*, 515 U.S. at 833), and "as in *Rust*, 'the government's own message is being delivered,' " *ibid.* (quoting *Velazquez*, 531 U.S. at 541). Because the government may "communicate a particular viewpoint through its agents and require those agents not convey contrary messages," the court reasoned, "it follows that in choosing its agents, the government may use criteria to ensure that its message is conveyed in an efficient and effective fashion." *Ibid.* "This is particu-

larly true," the court explained, "where the government is speaking on matters with foreign policy implications," as it is through the Leadership Act. *Ibid.*

The District of Columbia Circuit therefore concluded that "[t]he effectiveness of the government's viewpoint-based program would be substantially undermined, and the government's message confused, if the organizations hired to implement that program * * * could advance an opposite viewpoint in their privately-funded operations." *DKT*, 477 F.3d at 762-763 (internal quotation marks omitted). The court emphasized that Section 7631(f) "does not compel DKT to advocate the government's position on prostitution and sex trafficking; it requires only that if DKT wishes to receive funds it must communicate the message the government chooses to fund. This does not violate the First Amendment." *Id.* at 764. Precisely the same analysis is appropriate in this case.

2. Congress determined that the policy condition is an important part of the Leadership Act's comprehensive strategy

a. The court of appeals agreed that, in enacting the Leadership Act, Congress chose to adopt a comprehensive strategy to combat the global spread of HIV/AIDS. See Pet. App. 4a. The court held, however, that Section 7631(f)'s limitation of funding to organizations that have policies opposing prostitution and sex trafficking is peripheral to that strategy. See *id.* at 32a-34a. That holding is impossible to square with the legislative scheme.

As a general matter, Congress has authorized the President to furnish foreign assistance "to prevent, treat, and monitor HIV/AIDS." 22 U.S.C. 2151b-2(c)(1) (Supp. V 2011). Such aid should be "focused on women and youth, including strategies to protect women and

prevent mother-to-child transmission of the HIV infection." 22 U.S.C. 2151b-2(b) (Supp. V 2011). Among its goals, Congress wanted to help "individuals avoid behaviors that place them at risk of HIV infection," including "reducing sexual violence and coercion." 22 U.S.C. 2151b-2(d)(1)(A) (Supp. V 2011). Congress therefore directed that educational efforts concentrate on "specific populations that represent a particularly high risk of contracting or spreading HIV/AIDS, including those exploited through the sex trade" and "victims of rape and sexual assault." 22 U.S.C. 2151b-2(d)(3)(A).

In the Leadership Act specifically, Congress made "the reduction of HIV/AIDS behavioral risks a priority of *all prevention efforts*." 22 U.S.C. 7611(a)(12) (Supp. V 2011) (emphasis added). The Act directs the President to undertake various efforts to eliminate the commercial sex trade. 22 U.S.C. 7611(a)(12)(F), (H) and (J) (Supp. V 2011). In addition, Congress found as a factual matter—based in part on statistics about South Africa and Cambodia—that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). Congress accordingly decreed that, under the Leadership Act, "it should be the policy of the United States to eradicate such practices." *Ibid.* Simply put, Congress made a considered decision to oppose prostitution and sex trafficking and to pursue their reduction, particularly in developing countries where most of the federally funded programs at issue are provided.

The two limitations Congress imposed on the use of Leadership Act funds work together to further its objectives. Section 7631(e)—which respondents do not challenge—bars the use of funds under the Act "to promote

or advocate the legalization or practice of prostitution or sex trafficking." It thereby ensures that recipients do not use Leadership Act funds to promote prostitution or sex trafficking. The grant of federal funds, however, could free nonfederal monies to be used to promote prostitution or sex trafficking. Cf. *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010). The requirement in Section 7631(f) that recipients have a policy opposing prostitution and sex trafficking prevents the organization (or its employees) from promoting, advocating, or affirmatively condoning prostitution or sex trafficking. It thereby prevents recipients from undermining the very program they receive federal funds to advance.

Even if recipients did not promote prostitution or sex trafficking with nonfederal funds, Section 7631(f) keeps them from ignoring Congress's objectives or acting with indifference toward them. Section 7631(f)'s policy requirement serves to ensure that funding recipients adhere to Act's policy opposing prostitution and sex trafficking in the foreign countries where they operate. To be sure, Section 7631(f) only requires recipients to have such a policy; it does not further require them to actively disseminate that policy to foreign nationals. Indeed, only some recipients will actively convey that message by implementing federally funded projects aimed at reducing the commercial sex trade. But Congress saw a value in having all recipients, whatever their particular focus, have a policy opposing prostitution and sex trafficking. Respondents do not dispute (Br. in Opp. 5-6 & n.4) that they represent most of the groups based in the United States that receive the HIV/AIDS funding at issue. Congress reasonably believed that if all those groups adopt policies opposing the sex trade and traf-

ficking, they will together advance that goal with consistency, force, and scope.

Respondents thus err in relying on the premise that "the Leadership Act was designed to combat HIV/AIDS through a broad and comprehensive set of actions—not words." Br. in Opp. 28-29. The Leadership Act seeks to combat HIV/AIDS through both actions *and* words, and Section 7631(f) helps establish and convey the policy perspective on prostitution and sex trafficking in federally funded HIV/AIDS relief efforts. Under the Act, recipients are free to decline to participate in that strategy, but the First Amendment does not entitle them to elect participation in the program, accept program funding, and then disregard an important goal of the program. See *Guardians Ass'n*, 463 U.S. at 596 (opinion of White, J.) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: [the] grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt.").

b. Relatedly, respondents assert that Section 7631(f) is a "marginal provision" that is not "integral to the Leadership Act's goals." Br. in Opp. 29, 31 (internal quotation marks omitted). The court of appeals believed the same thing and rejected the government's contention "that advocating against prostitution [and sex trafficking] is indeed 'central' to the Leadership Act Program." Pet. App. 33a. The court acknowledged that in some circumstances the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program." *Id.* at 32a; see *ibid.* ("[I]f the government were to fund a campaign urging children to 'Just Say No' to drugs, we do not doubt that it could require grantees to state that they oppose drug

use by children."). But that is so, the court reasoned, when "the government's program *is*, in effect, its message." *Ibid.* In the court's view, that is not the case here because "[t]he stated purpose of the Leadership Act is to fight HIV/AIDS" rather than to fight prostitution and sex trafficking. *Ibid.* (emphasis omitted).

That approach cannot be correct. In cases involving restrictions challenged on First Amendment grounds, it would require courts to make their own case-by-case judgments about whether Congress's chosen policy and the related condition are "central" or merely "subsidiary" to a given funding program. Pet. App. 33a (internal quotation marks omitted). But it is for *Congress*—not respondents or the lower courts—to decide when a condition on the receipt of federal funds is integral to the funding program at issue. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 n.11 (1977) ("Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute.") (quoting *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973)); *McGinnis*, 410 U.S. at 276 ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate.").

Even taking the court of appeals' test on its own terms, the court erred in dismissing Section 7631(f) as peripheral to the Leadership Act. Pet. App. 32a-34a. As explained above, Congress did not want to address only the effects of HIV/AIDS; it also wanted to address the factors that place certain groups at higher risk of contracting HIV/AIDS. See pp. 3-5, 19-20, *supra*. Congress determined when it enacted the Act that reducing and eradicating prostitution and sex trafficking are of

great importance in preventing the spread of HIV/AIDS. See, *e.g.*, 22 U.S.C. 7601(23). In Congress's view, there are different ways "to fight HIV/AIDS," Pet. App. 32a (emphasis omitted), one of which is to oppose and work to eliminate certain activities that help to spread the disease. In that critical respect, "the government's program *is*, in effect, its message." *Ibid.*

c. The court of appeals viewed the exemptions for certain entities in Section 7631(f) as justifying its conclusion that affirmatively opposing prostitution is not central to the Leadership Act. See Pet. App. 33a-34a; 22 U.S.C. 7631(f) ("[T]his subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency."). That was incorrect. As a threshold matter, "the relevance of a statute's underinclusiveness is that it may reveal discrimination on the basis of viewpoint or content, or may undercut the statute's purported nondiscriminatory purpose." *Ruggiero* v. *FCC*, 317 F.3d 239, 250 (D.C. Cir.), cert. denied, 540 U.S. 813 (2003). Here, "[b]ecause viewpoint discrimination raises no First Amendment concerns when the government is speaking, the underinclusiveness of the certification requirement is immaterial." *DKT*, 477 F.3d at 763 n.5; see *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547-548 (1983) (upholding lobbying restrictions that applied to nonprofit organizations but exempted veterans' organizations).

More basically, however, the exempt entities are not similarly situated to the organizations subject to Section 7631(f). One of the exempt entities, the International AIDS Vaccine Initiative (IAVI), is a nongovernmental organization that focuses on developing a vaccine for

HIV/AIDS. See Pet. App. 91a; 22 U.S.C. 2222(*l*) (Supp. V 2011). Congress reasonably could conclude that there is little risk IAVI would undermine the Leadership Act's opposition to prostitution and sex trafficking. The remaining exempt entities—the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; and United Nations agencies—are international bodies whose membership is composed primarily or exclusively of sovereign states. See Pet. App. 91a-92a. Congress appropriately could decide not to attempt unilaterally to require those organizations to adopt policies opposing prostitution or sex trafficking. The United States' relationship with entities composed or governed by other sovereign states is very different from its relationship with private nongovernmental organizations. Congress reasonably could determine that other sovereign states should be left to pursue their own policy objectives. And the international character and composition of the exempt bodies makes it quite unlikely that their views or actions would be specially attributed to the United States (particularly in light of Congress's clear statement of policy in the Leadership Act itself).

3. Respondents argue that Section 7631(f) cannot be intended to ensure that recipients work toward the government's goals and communicate the government's message, because it "compel[s] private speakers to adopt and espouse *as their own* the government's message." Br. in Opp. 26. Respondents are mistaken. The Court's cases in this area rest on the assumption that when the government "enlists private entities to convey its own message," *Rosenberger*, 515 U.S. at 833, the private speakers are not entitled to transmit the message in a way that distances themselves from it or even indicates their own lack of agreement with it. For instance,

if the government funds a campaign opposing drug use by children, it may require the advertisements to declare "Just Say No To Drugs," rather than "The United States Government Wants You To Just Say No To Drugs." A governmental funding program may enlist private entities to speak in the same way that the government speaks—or in the same way that the government would speak if it undertook itself "to transmit specific information pertaining to its own program." *Ibid.*

Here, Congress has expressed its purpose "to eradicate" prostitution and sex trafficking, 22 U.S.C. 7601(23), and it wants recipients to adopt a similar stance opposing those practices so that they will be reliable partners and emissaries. Section 7631(f)'s funding condition that recipients have a policy opposing prostitution and sex trafficking ensures that recipients act as faithful agents in that regard in spending federal funds. Even the court of appeals accepted the legitimacy of those governmental interests. As the court correctly recognized, "if the government were to fund a campaign urging children to 'Just Say No' to drugs, * * * it could require grantees to state that they oppose drug use by children." Pet. App. 32a. That would remain true even if only some recipients conducted the advertising campaign and other recipients performed different but related projects, because they all would be part of a comprehensive federal strategy aimed at decreasing juvenile drug use.

To take an analogous example, suppose that in the 1980s Congress had authorized foreign assistance to address racial violence in South Africa. Suppose further that, based on its belief that apartheid was a cause of such violence, Congress had adopted a policy calling for the eradication of apartheid and made funding under the

program available only to private organizations that adopted a policy opposing apartheid. On respondents' view, such legislation would be unconstitutional because it would require organizations that elect to participate in the program to adopt and communicate the government's policy perspective. Of course, that is the very point of the funding under the hypothetical program in the first place: Congress wants the private partners in its foreign program to stand against racial segregation, both to influence conditions in that foreign country and to ensure that recipients comport with Congress's determination that racial segregation should be eliminated as a means of addressing racial violence. As in the present case, private organizations with a different view of apartheid would be free to decline federal funding, but the First Amendment would not confer on them a right to accept federal funding and yet refuse to commit to one of the program's central objectives.

C. Section 7631(f) Is Not Unconstitutional On The Rationale That It Compels Recipients To Speak With Respect To Prostitution And Sex Trafficking

1. The court of appeals reasoned that the Act's funding condition is impermissible because it affirmatively compels speech by the recipients of the Act's funds. See Pet. App. 25a. This Court has never held, however, that it matters whether conditions on the receipt of federal funding compel speech or silence. Indeed, the Court has held that the distinction ordinarily is without constitutional significance even in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional signifi-

cance."). There is no reason, then, that such a distinction should be determinative in the context of funding conditions, where recipients may avoid the conditions altogether simply by declining to accept the federal funds at issue. See, *e.g.*, *Rust*, 500 U.S. at 199 n.5 ("[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy.").

The reasoning of this Court's decisions on funding conditions likewise lends no support to the court of appeals' reliance on a strict affirmative-negative dichotomy. In *Rust*, for instance, the Court upheld against a First Amendment challenge restrictions that barred federally funded family-planning programs from providing abortion counseling or encouraging abortion as a method of family planning. See 500 U.S. at 179-181, 192-193. The Court recognized that "[t]he [g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." *Id.* at 193. Similarly, in *Regan*, this Court upheld a restriction on lobbying by nonprofit organizations that were allowed to receive tax-deductible contributions. See 461 U.S. at 550. The Court held that Congress did not violate the First Amendment by choosing "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.* at 544.

Those cases do not suggest that the constitutionality of a federal funding condition under the First Amendment turns on whether the recipient must (i) adopt a policy or convey a message that the government program is intended to promote or (ii) refrain from adopting a policy or conveying a message that is contrary to the funding program. In either situation, what matters

is that the government has elected to selectively fund a program—in which participation is entirely voluntary—aimed at encouraging or discouraging certain activities of substantial public interest: abortion counseling in *Rust*, certain types of lobbying in *Regan*, and foreign prostitution and sex trafficking in this case. See Pet. App. 99a (Cabranes, J., dissenting from the denial of reh'g en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions."); *id.* at 103a (Cabranes, J., dissenting from the denial of reh'g en banc) ("[I]t is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention.").

2. Respondents contend, and the court of appeals agreed, that "affirmative compulsion of speech [is] more troubling than an affirmative compulsion of silence." Br. in Opp. 20; see Pet. App. 25a-26a & n.3. But neither the court of appeals nor respondents have addressed the Court's rejection of that affirmative-negative distinction in *Riley*, nor have they offered any reason why the distinction should be dispositive here. Respondents cite (Br. in Opp. 20) *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), but in those cases this Court simply held that citizens could not be compelled to speak when they wished to remain silent. The Court did not hold that silencing those who wish to speak is a less serious matter under the First Amendment. Indeed, the Court recognized that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714.

The court of appeals observed that none of this Court's previous cases considered "an affirmative speech restriction." Pet. App. 26a n.3; see Br. in Opp. 20-21. Although this Court's decisions on funding conditions did not arise on identical facts, the logic of those decisions is inescapable. As the Court has recognized, Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest," *Rust*, 500 U.S. at 193, and it may do so by "us[ing] private speakers to transmit specific information pertaining to its own program," *Rosenberger*, 515 U.S. at 833. When Congress enlists private speakers in that way, there is no reason why it must "transmit [its] information" only indirectly or passively, by requiring private entities to refrain from speech on certain subjects but not by requiring the same entities to actually embrace the government's message. Such a distinction would make little sense and would undercut Congress's ability to "enlist[] private entities to convey its own message." *Ibid.* Indeed, in many cases, Congress might be able to frame the funding condition as either an "affirmative" or a "negative" limitation: recipients could be required to *promote* certain activities but not others, or they could be required to *oppose* certain activities but not others. Either way, Congress's characterization bears on questions of legislative policy, not constitutional doctrine.

D. Section 7631(f) Does Not Aim At The Suppression Of Disfavored Viewpoints

1. Congress's authority under the Spending Clause is not without First Amendment limits. This Court has indicated that a funding condition is subject to heightened scrutiny when it is aimed at suppressing "dangerous ideas," *Speiser*, 357 U.S. at 519 (quoting *American*

Commc'ns Ass'n v. *Douds*, 339 U.S. 382, 402 (1950)), or "disfavored viewpoints," *Finley*, 524 U.S. at 587. It would therefore raise a different set of constitutional issues if Congress's conditions on Leadership Act funding were "calculated to drive 'certain ideas or viewpoints from the marketplace.' " *Ibid.* (quoting *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)); cf. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (suggesting that a subsidy scheme may not be "manipulated" in order to have a "significant coercive effect").

In this case, however, respondents have not argued, and the court of appeals did not conclude, that Section 7631(f)'s funding condition is aimed at suppressing expression concerning prostitution and sex trafficking by private HIV/AIDS relief organizations. As Judge Straub explained in dissent, "[t]here is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy Requirement was to suppress pro-prostitution views," and "[t]he Policy Requirement and Guidelines therefore in no way silence government criticism or contrary views on prostitution and HIV/AIDS." Pet. App. 83a-84a. Private HIV/AIDS relief organizations (like anyone else) remain free to advocate for, or be neutral toward, prostitution and sex trafficking. Congress has simply made the reasonable judgment that if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public or private funds, it would undermine the government's program and confuse its message opposing prostitution and sex trafficking.

2. Respondents rely (Br. in Opp. 19, 25-26) on two cases—*Velazquez*, *supra*, and *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984)—in which this Court invalidated federal funding conditions under the First Amendment. Those cases are inapposite. In both cases, the government was funding and facilitating private speech rather than promoting its own program and message through private speakers. See *Velazquez*, 531 U.S. at 542, 548; *League of Women Voters*, 468 U.S. at 378-380, 386-387, 395; see also *Rosenberger*, 515 U.S. at 834. And in both cases, the Court determined that Congress's funding conditions attempted "[to] suppress speech inherent in the nature of the medium." *Velazquez*, 531 U.S. at 543; see *id.* at 544-545 (restricting lawyers from advancing certain arguments as a condition of funding "distorts the legal system" and "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"); *League of Women Voters*, 468 U.S. at 396-397. Here, respondents have not argued that the ability to advocate for, or remain neutral toward, prostitution and sex trafficking is "inherent" in providing HIV/AIDS-related programs and services in foreign countries.

Moreover, in both *Velazquez* and *League of Women Voters*, this Court relied on the absence of any alternative channel for the restricted expression. See *Velazquez*, 531 U.S. at 546-547 ("[T]here is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to *Rust*."); *League of Women Voters*, 468 U.S. at 400 (observing that the statute would "plainly be valid" if stations were allowed "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds"). As explained below, HHS and USAID have es-

tablished affiliation guidelines (similar to the program-integrity requirements upheld by this Court in *Rust*) that allow Leadership Act funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). See pp. 44-45, *infra*. The agencies' guidelines alleviate any burden that might otherwise exist on the ability to communicate contrary views on prostitution and sex trafficking.

3. Even in the cases in which this Court has invalidated a condition on something other than direct federal funding, it has done so because the condition aimed to suppress the expression of a certain set of ideas. See, *e.g.*, *Speiser*, 357 U.S. at 529 (invalidating on due process grounds a state law that conditioned a veterans' tax exemption on swearing an oath not to advocate the overthrow of the federal or state government); *id.* at 519 ("The denial [of the tax exemption] is frankly aimed at the suppression of dangerous ideas.") (internal quotation marks omitted); cf. *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (holding that a state college's refusal to renew an employment contract would violate the First Amendment if it were based on the employee's criticism of his superiors on matters of public concern). But at least as a general matter a federal funding program is designed to enlist recipients in advancing the government's own policy objectives, see *Finley*, 524 U.S. at 587-588, and here respondents have not attempted to demonstrate that Section 7631(f) is designed to suppress private speech supporting prostitution and sex trafficking.

E. Section 7631(f) Is Not A Direct Speech Regulation But A Condition On The Receipt Of Federal Funds

For the most part, respondents treat Section 7631(f) as if it were a direct regulation of speech rather than as a condition on the receipt of federal funds. Respondents repeatedly rely (Br. in Opp. 18-21) on this Court's cases analyzing direct regulations that compel speech or discriminate on the basis of viewpoint, without any acknowledgment that the government "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Finley*, 524 U.S. at 587-588. That distinction between funding conditions and direct speech regulations is critical to resolving this case.

1. Respondents argue (Br. in Opp. 20-21) that Section 7631(f) compels speech in violation of the First Amendment. The court of appeals accepted that argument, relying on this Court's decisions in *Wooley*, *Speiser*, and *Barnette* addressing the compelled-speech doctrine. See Pet. App. 25a-26a. Those cases, however, did not involve Congress's spending power. Rather, "[i]n each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. None involved the government's selective funding of organizations best equipped to communicate its message." *DKT*, 477 F.3d at 762 n.2. As the District of Columbia Circuit recognized, that distinction is crucial. "Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education, *Barnette*, 319 U.S. at 629, or access to public roads,

Wooley, 430 U.S. at 715." *Ibid.* (parallel citations omitted).

The compelled-speech doctrine addresses circumstances in which "an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). In *Barnette*, the state law at issue required schoolchildren to recite the Pledge of Allegiance and salute the flag, see 319 U.S. at 642; and in *Wooley*, the state law required New Hampshire motorists to display the state motto, "Live Free or Die," on their license plates, see 430 U.S. at 707, 717. Conditioning the availability of federal HIV/AIDS assistance on adhering to that program's policy opposing prostitution and sex trafficking "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *FAIR*, 547 U.S. at 62. Unlike in *Barnette* and *Wooley*, respondents have not been compelled to do anything: they must have a policy *as a result of their own choice to accept federal funds*, not as a result of any legal mandate.[5]

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[5] The court of appeals purported to recognize that *Barnette* and *Wooley* are "distinguishable," but it "dr[e]w from them the underlying principle that the First Amendment does not look fondly on attempts by the government to affirmatively require speech." Pet. App. 26a n.3. But what makes those cases distinguishable is that they dealt with direct compulsions of private speech, not criteria for implementing the government's own programs. The court of appeals' "underlying principle" thus does not apply to this context, because when the government "is the speaker or when it enlists private entities to convey its own message, * * * it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833.

Respondents' real objection to Section 7631(f) rests not on First Amendment doctrine but on a policy judgment. They do not want to adopt a policy opposing prostitution because, in their view and as one of respondents acknowledged in *DKT*, "this might result in stigmatizing and alienating many of the people most vulnerable to HIV/AIDS—the sex workers." 477 F.3d at 761 (internal quotation marks omitted); see Br. in Opp. 7 (noting respondents' belief "that adopting a policy that explicitly opposes prostitution would jeopardize [r]espondents' effectiveness in working with high-risk groups to fight HIV/AIDS"). That presumably explains why respondents have not challenged the portion of Section 7631(f) that conditions funding on having a policy opposing sex trafficking: respondents do not wish to work with, and thus do not mind stigmatizing and alienating, sex traffickers.

Of course, respondents are fully entitled to believe, as a matter of policy, that they will operate more effectively or better serve Congress's goals if they are permitted to remain neutral on the practice of prostitution (or even sex trafficking). See Compl. at 7, *DKT Int'l, Inc.* v. *USAID*, 435 F. Supp. 5 (D.D.C. 2006) (No. 1:05-cv-1604), rev'd, 477 F.3d 758 (D.C. Cir. 2007) ("[A]s an organization working to prevent the spread of HIV/AIDS, [DKT] strongly believes it can best do that * * * by maintaining neutrality on * * * the HIV/AIDS epidemic and prostitution."). And there is no reason to doubt the strength of respondents' commitment to preventing the spread of HIV/AIDS or the sincerity of their belief that Congress would best achieve that objective without any condition that funding recipients have a policy opposing prostitution and sex trafficking. But the "[g]overnment can, without violating the Constitution, selectively fund

a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193; see *Finley*, 524 U.S. at 597 (Scalia, J., concurring in the judgment) (quoting *Rust*). It is Congress, not this Court, that is the appropriate forum for challenging the public health rationale for the funding condition in Section 7631(f).

2. Respondents' and the court of appeals' assertion that Section 7631(f) impermissibly discriminates on the basis of viewpoint likewise ignores the distinction between funding conditions and direct speech regulations. See Br. in Opp. 20-21; Pet. App. 27a-29a. Insofar as any communicative element of a federal program is concerned, when the government "enlists private entities to convey its own message," the government may "regulate the content of what is or is not expressed." *Rosenberger*, 515 U.S. at 833; see *DKT*, 477 F.3d at 761 ("When it communicates its message, * * * the government can—and often must—discriminate on the basis of viewpoint."). Respondents and the court of appeals thus once again miss the point by relying (Br. in Opp. 19, 21; Pet. App. 27a) on cases involving direct, content-based regulations of speech rather than federal funding programs. See, *e.g.*, *Simon & Schuster, Inc.*, 502 U.S. at 115-117, 123 (invalidating a New York state law that imposed content-based financial burdens on certain speech by accused or convicted criminals).[6]

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[6] Respondents also are mistaken in their characterization of Section 7631(f). Respondents' employees are not required by Section 7631(f) to affirmatively express an opinion about prostitution and sex trafficking when they come into contact with members of high-risk groups. Rather, as explained below, funding recipients communicate

F. The Agencies' Affiliation Guidelines Obviate Any Constitutional Difficulty

1. a. To the extent that Section 7631(f) poses any constitutional difficulty, the agencies' affiliation guidelines dispel it. As an initial matter, recipients comply with the statutory requirement simply by accepting federal funds. Under the agencies' guidelines, HHS and USAID include the policy provision "in the award documents for any grant, cooperative agreement, or other funding instrument." 45 C.F.R. 89.1(b); see Pet. App. 297a, 302a-303a, 308a. By signing award documents and accepting federal funds pursuant to those agreements, recipients thereby "agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. 89.1(b); see Pet. App. 297a, 302a-303a, 308a. Recipients are not required to take additional, affirmative measures to certify their compliance with the statutory condition or to publicize their policy to third parties.

b. The agencies' guidelines also allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). Those guidelines permit an organization to remain eligible for funding and yet be affiliated with a group that "engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," so long as the organization that receives funding has "objective integrity and independence from [any affiliated] organization." 45 C.F.R. 89.3; see Pet. App. 297a, 309a. Whether a recipient is inde-

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opposition to prostitution and sex trafficking *to HHS and USAID* through the funding agreement, which is directed to securing the organization's commitment to the program's goals.

pendent from affiliated organizations depends on the totality of the circumstances, including such factors as whether the groups are legally distinct and maintain separate personnel, records, facilities, and forms of identification. See 45 C.F.R. 89.3(b); Pet. App. 298a, 309a-310a. Those affiliation guidelines are modeled on the program-integrity standards that were upheld by the court of appeals in *Velazquez*, see *Velazquez* v. *Legal Servs. Corp.*, 164 F.3d 757, 761-762 (2d Cir. 1999), cert. denied in relevant part, 532 U.S. 903 (2001), which in turn were modeled on the similar requirements upheld by this Court in *Rust*.

2. The court of appeals rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. Pet. App. 35a. "It may very well be that the Guidelines afford [respondents] an adequate outlet for expressing their opinions on prostitution," the court stated, "but there remains, on top of that, the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution." *Id.* at 36a.

That reasoning is not consistent with this Court's decisions addressing similar affiliation guidelines. For instance, the restriction at issue in *Regan* prevented nonprofit organizations from lobbying with tax-deductible contributions, but a related provision permitted those organizations to form affiliates that could engage in lobbying activities. See 461 U.S. at 544. The Court noted that "dual structure" in upholding the restriction, *ibid.*, observing that an affected organization had not been denied "any independent benefit on account of its intention to lobby," *id.* at 545. See *id.* at 553 (Blackmun, J.,

concurring) (reasoning that the lobbying restriction was permissible because of the affiliate provision); see also *Rust*, 500 U.S. at 198 ("Congress has merely refused to fund [abortion-related] activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the [federal] project in order to ensure the integrity of the federally funded program."). To the same effect, in *League of Women Voters*, *supra*, in which the Court invalidated a federal law that prohibited editorializing by federally funded television and radio stations, the Court noted that if Congress had permitted stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." 468 U.S. at 400.

In light of *Regan*, *League of Women Voters*, and *Rust*, other circuits have found that affiliation guidelines obviate any constitutional difficulty, because they allow funding recipients to cabin the effects of their undertakings to the scope of the federally funded program at issue. See, *e.g.*, *DKT*, 477 F.3d at 763 ("Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution."); *Planned Parenthood of Mid-Mo. & E. Kan., Inc.* v. *Dempsey*, 167 F.3d 458, 463-464 (8th Cir. 1999) (upholding a Missouri statute that "require[d] abortion services to be provided through independent affiliates"); *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1026 (9th Cir.) (upholding, as "consistent with the decisions in *Regan* and *League of Women Voters*," regulations "requir[ing] that if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activ-

ities"), cert. denied, 525 U.S. 1015 (1998). As other courts of appeals have recognized, affiliation guidelines like those promulgated by HHS and USAID reinforce the validity of funding conditions like the one at issue here.

The court of appeals reasoned that the HHS and USAID affiliation guidelines do not adequately address respondents' constitutional challenge because organizations electing to accept funds must convey a particular message rather than refrain from speaking. Pet. App. 35a-36a. That reasoning misunderstands the First Amendment value of affiliate structures. Regardless of whether a funding condition requires the recipient to speak or remain silent, the relevant question is whether the condition "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197. Here, the affiliation guidelines—which are modeled on the program integrity requirements upheld in *Rust* but which have been made more flexible to account for the challenges of operating overseas, see p. 51, *infra*—allow a recipient to cabin the effects of Section 7631(f)'s funding condition to the scope of Leadership Act programs and services.

3. According to respondents, "the separation requirements [in *Rust*] were designed to maintain adequate separation among *programs* within a grantee organization, as opposed to the separation requirements here which are designed to maintain adequate separation among independent *entities or affiliates*." Br. in Opp. 23 (internal citation omitted). The District of Columbia Circuit correctly rejected that distinction in *DKT*. See 477 F.3d at 761-762. The plaintiff-organization in *DKT* argued (as respondents do here)

that *Rust* "involved funding restrictions only on *projects*, not on *grantees*." *Id.* at 763. The court reasoned, however, that just as a clinic in *Rust* could advocate abortion "through programs that [were] separate and independent from the project that receives Title X funds," *ibid.* (quoting *Rust*, 500 U.S. at 196), so too here a funding recipient could "set[] up a subsidiary organization that certifies it has a policy opposing prostitution," *ibid.* The court in *DKT* thus recognized that the constitutionality of Section 7631(f) should not depend on whether respondents have to channel federal funds into separate projects or separate affiliated entities. See *Velazquez*, 164 F.3d at 766-767 (upholding funding restrictions on grantees rather than projects).[7]

Respondents argue (Br. in Opp. 22-24) that Section 7631(f) imposes an entity-wide restriction and thus prevents an *affiliate* from spending private funds to espouse prostitution or sex trafficking. But respondents do not dispute that they can form affiliates whose sole purpose is receiving and administering federal HIV/AIDS funding. It is no answer, then, to say that even if Section 7631(f) does not infringe respondents' speech rights (in part because they may form affiliates and otherwise continue operating as they do now), it infringes their affiliates' speech rights. The point is that by allowing respondents to form special-purpose affili-

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[7] Indeed, the agencies' guidelines are more favorable to respondents than the *DKT* court foresaw. The court in *DKT* assumed that a funding recipient would have to form a separate subsidiary organization. See 477 F.3d at 763 & n.4. In April 2010, however, the agencies modified their affiliation guidelines so that legal separation between an organization and its affiliate would no longer be a blanket prerequisite but would be one factor in determining an affiliate's independence. See Pet. App. 10a-11a.

ates (and thereby cabin the effects of Section 7631(f) to the scope of the federally funded programs at issue), the agencies' guidelines appropriately confine any burden that might otherwise exist on the communication of contrary views on prostitution and sex trafficking.

G. Respondents' Vagueness Challenge Is Not Presented And Lacks Merit In Any Event

1. Respondents contend (Br. in Opp. 33) that the policy condition is unconstitutionally vague. Neither of the courts below addressed respondents' vagueness challenge, see Pet. App. 36a n.8, 214a-215a, 250a, and respondents do not point to any other court that has done so. This Court "is one of final review, 'not of first view,' " and there is no reason for the Court "to abandon [its] usual procedures in a rush to judgment without a lower court opinion." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). In the event that the Court reverses the judgment below, respondents may pursue their vagueness challenge on remand.

2. In any event, respondents do not even claim before this Court that the statute itself is vague. Section 7631(f) requires respondents to "have a policy explicitly opposing prostitution and sex trafficking," and they have not pointed to any lack of clarity in that requirement. Numerous federal statutes require the adoption of a policy addressing a particular issue. See, *e.g.*, 12 U.S.C. 1831r-1(c) (requiring insured depository institutions to "adopt policies for closings of branches"); 20 U.S.C. 1232h(c)(1) (requiring federally funded local educational agencies to "develop and adopt policies, in consultation with parents," on particular issues); 42 U.S.C. 5304(*l*)(1) and (2) (providing that federal funds

may not be given to local governmental units that "fail[] to adopt and enforce" particular civil rights policies).

Faced with that clear statutory requirement, respondents argue (Br. in Opp. 9, 33) instead that the agencies' *affiliation guidelines* are unconstitutionally vague. As explained above, those guidelines allow funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). "A recipient," however, "must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking." 45 C.F.R. 89.3; see Pet. App. 297a, 309a. According to respondents (Br. in Opp. 33), that regulation is vague because it does not define when an affiliated organization is engaged in an activity "inconsistent" with opposition to prostitution and sex trafficking. But whatever the merits of that argument, the district court enjoined enforcement of the *statute*, see Pet. App. 252a (enjoining petitioners "from enforcing the requirement § 7631(f)" of the Leadership Act), and the court of appeals affirmed that injunction, see *id.* at 37a. On remand, respondents may pursue their challenge to the affiliation guidelines, but that challenge provides no basis for the lower courts' invalidation of the statute.

3. In any event, respondents' argument lacks merit. The test for whether the affiliation guidelines provide sufficient clarity is a very permissive one in the context of a governmental funding program: "[W]hen the [g]overnment is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Finley*, 524 U.S. at 589. Respondents' burden is even heavier than that, however, because they

have brought a preenforcement facial challenge to the guidelines—and they have done so despite the agencies' expressed willingness to provide preenforcement advice. As HHS explained in the preamble to its regulation, "[g]iven the numerous factual situations that may arise, the Department has deliberately adopted a case-by-case approach in this area, recognizing that circumstances in some countries may make it difficult for organizations to satisfy some of the factors demonstrating objective integrity and independence. The Department also plans to work with recipients to address individual questions regarding the separation criteria, and to help remedy violations before taking enforcement action." 75 Fed. Reg. 18,762 (Apr. 13, 2010). Similarly, recipients may direct questions to USAID, see Pet. App. 311a, which is willing to work with them to address application of the separation criteria. By virtue of this suit, however, HHS and USAID have been enjoined from enforcing the statute against domestic funding recipients—and thus applying their affiliation guidelines and providing preenforcement advice to those organizations—for the last six years. Respondents therefore must show that the guidelines are so unclear that HHS and USAID should never have the chance to explain, apply, and then enforce them.

Respondents cannot make that showing. At the least, an affiliated organization is "engage[d] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," 45 C.F.R. 89.3, if the affiliated organization "promote[s] or advocate[s] the legalization or practice of prostitution or sex trafficking," 22 U.S.C. 7631(e). That is the limitation on the use of federal funds in Section 7631(e) of the Leadership Act—a limitation that respondents do not challenge on

vagueness grounds. In other words, respondents concede that it is clear what they may not do with federal funds, *i.e.*, promote or advocate the legalization or practice of prostitution or sex trafficking. At a minimum, the guidelines incorporate that same standard. If an organization engages in such promotion or advocacy (with or without federal funds), then it is "engage[d] in activities inconsistent with * * * opposition to the practices of prostitution and sex trafficking" and the organization must maintain its independence from any recipient. Whether the guidelines extend beyond the limitation on the use of federal funds in Section 7631(e) may be addressed as applied to particular situations in consultation with the agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,
Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the courts below correctly determined that respondents are likely to succeed on their claim that the First Amendment prohibits the government from requiring grantees, as a condition of receiving federal funds, to adopt and express as their own the government's viewpoint on an issue of public debate, while also prohibiting grantees from expressing any views or undertaking any activity, even with private funds, "inconsistent with" the government's viewpoint.

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149 Cong. Rec. 11,804 (2003) 12

OTHER AUTHORITIES

CARE, *CARE USA Annual Report 2011* (2012), *available at* http://www.care.org/newsroom/publications/annualreports/care-usa-annual-report-2011/download/AR_2011_Final_singles.pdf 5

Henry J. Kaiser Family Foundation, *Budget Tracker* http://www.kff.org/globalhealth/upload/8045_FY2013.pdf (2013) 43

IAVI, *Where We Work*, http://www.iavi.org/Where-We-Work/Scientific-Network/Clinical-Research-Centers/Pages/default.aspx (last visited Mar. 27, 2013) 10

Pathfinder International, *Kenya*, http://www.pathfinder.org/our-work/where-we-work/kenya/ (last visited Mar. 26, 2013) 5

TABLE OF AUTHORITIES—Continued

Page(s)

USAID, ADS 303.3.6 (2012), *available at* http://transition.usaid.gov/policy/ads/300/303.pdf 7, 8

USAID, *PVO Registration Frequently Asked Questions*, http://idea.usaid.gov/ls/pvo/faq (last visited Mar. 27, 2013) 8

USAID, *USAID Primer* http://transition.usaid.gov/about_usaid/PDACG100.pdf (2006) 8

IN THE

Supreme Court of the United States

No. 12-10

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,
Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

INTRODUCTION

The First Amendment prohibits the government from compelling private parties to adopt its chosen viewpoint as their own or from regulating their lawful, privately funded speech. The government in this case nonetheless claims a power almost as broad: the power to condition federal funding on restrictions of speech that apply not only within the scope of the federally funded program, but also to any funded entity's privately funded expression. While the government's spending powers are considerable, the government may not use them "to 'produce a result which [it] could not command directly.'" *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

This case does not implicate the government's authority to subsidize some private speech or activity and not others or to ensure that public funds are confined to their intended use. The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act) already prohibits the use of government funds to "promote or advocate the legalization or practice of prostitution." 22 U.S.C. § 7631(e). The constitutionality of that provision is not disputed here.

The provision at issue in this case goes much further. It requires that any recipient of Leadership Act funds must "have a policy explicitly opposing prostitution" and must, in addition, refrain from any speech the government deems "inconsistent with" that policy, not only when operating government-funded programs, but in all the recipient's operations. 22 U.S.C. § 7631(f); Pet. App. 297a. This Policy Requirement thus imposes a condition not on the use of federal funds, but on the recipient itself.

The Court has never upheld such a funding requirement before, so the government advances a novel theory in its defense. The government contends that it may subject recipients of federal funds to an ideological purity test to ensure that they will not criticize or appear indifferent to the government's viewpoint when engaging in privately funded speech outside the scope of the federally funded program. That is permissible, the government reasons, because organizations that do not wish to espouse and adhere to the government's viewpoint may simply forgo federal funding. But this Court has held such "choices" unconstitutional where, as here, they compel speech, drive disfavored viewpoints from the marketplace of ideas, and seek to do indirectly what the government cannot do directly. The government concedes there must be some limit on its

authority to impose such conditions on its grant of public funds, but any limit is illusory if it does not reach the Policy Requirement.

The government cites this Court's government-speech decisions, but its reliance on that doctrine is incoherent. On the one hand, the government argues (at 12) that the Policy Requirement is necessary "to ensure that its message is effectively communicated, and not undermined," by grantees. On the other hand, it asserts (at 27) that no grantee is required to "actively disseminate th[e] [anti-prostitution] policy." Only the latter proposition is correct: Respondents receive Leadership Act funding to combat the transmission of and provide treatment for HIV/AIDS using a wide range of strategies, not to convey a government message against prostitution. In these circumstances, the government-speech doctrine simply does not apply. It certainly does not permit the government to compel grantees to endorse the government's viewpoint or to dictate the content of their private speech.

Whatever concerns the government has ever had that recipients of Leadership Act funds might "undermine" a government policy are, in any event, insubstantial. The government makes no claim that respondents or others have been unreliable partners in the fight against HIV/AIDS or that they have posed any threat to any government policy. For nearly a decade, respondents and other grantees have implemented successful programs to combat HIV/AIDS using Leadership Act funds without the extraordinary condition the government seeks to impose. The government did not enforce the Policy Requirement against U.S.-based organizations in the first year after its enactment because the Department of Justice had opined that it "cannot be constitutionally applied" to them. Opp. App. 2a. And

since 2006, the Policy Requirement has been enjoined. Four organizations, which collectively received more than 20 percent of all Leadership Act funding in 2012, are expressly exempted from the Policy Requirement. Yet nothing in the record suggests that any government policy has been "undermined" during this time. The Policy Requirement is thus as unnecessary as it is impermissible.

Respondents wish only to preserve their First Amendment rights to hold their own views and either to remain silent or to engage—with private funds, outside the scope of any government program—in the important, ongoing debate about how best to deal with prostitution in the fight against HIV/AIDS. The government has ample authority to ensure that recipients of federal funding perform their missions effectively and refrain from diverting federal funds to impermissible purposes without trampling those rights.

STATEMENT

A. Respondents' Work Against HIV/AIDS

Respondents are U.S.-based nongovernmental organizations (NGOs) engaged in the global fight against HIV/AIDS. They operate a wide variety of public-health programs. Some programs are privately funded, while others are funded in whole or in part by federal grants under the Leadership Act.

Respondent Pathfinder International has worked to improve reproductive health services throughout the developing world since 1957. Among other projects, Pathfinder has trained local health providers in Tanzania in methods of preventing mother-to-child HIV transmission, supported healthcare providers treating HIV/AIDS patients in Mozambique, and provided

counseling and testing services to more than half a million patients in Kenya. *See* JA86-90; CAJA445, 507-508; Pathfinder International, *Kenya*, http://www.pathfinder.org/our-work/where-we-work/kenya/ (last visited Mar. 26, 2013). In addition to Leadership Act grants, Pathfinder receives funding for these efforts from agencies of the United Nations and World Bank, foreign governments, and private foundations, corporations, and individuals. JA161-162. Pathfinder has also run privately funded programs aimed at organizing sex workers to engage in HIV-prevention methods and safe-sex practices. JA166-168.

Respondent Alliance for Open Society International (AOSI) works to promote democratic governance, human rights, and public health in Central Asia, where war-driven changes in drug-trafficking routes caused injection-drug use to skyrocket. To fight the spread of HIV, AOSI has used Leadership Act funds and private grants to reduce injection-drug use, including among sex workers. *See* Pet. App. 119a.

With nearly 200 member organizations, respondent InterAction is the largest alliance of U.S.-based international-development and humanitarian NGOs. InterAction's members collectively receive more than $1 billion annually from the U.S. government and more than $7 billion annually from private donors, foreign governments, and international agencies to support their work around the world. JA101. For example, Cooperative for Assistance and Relief Everywhere, Inc. (CARE), a member of InterAction, has provided emergency-relief and health services in poor communities worldwide since 1945. In 2011, CARE projects reached over 122 million people in 84 countries. CARE, *CARE USA Annual Report 2011*, at 1 (2012), *available at* http://www.care.org/newsroom/publications/annualreports/

care-usa-annual-report-2011/download/AR_2011_Final_singles.pdf. CARE has used Leadership Act funds, grants from the United Nations, World Bank, and foreign governments, and private donations to provide services to children affected by HIV/AIDS throughout Africa and South Asia. JA148-149.

At the time this action was filed, respondent Global Health Council (GHC) was the world's largest professional association of organizations dedicated to international public health. Founded in 1972, GHC has sponsored conferences, forums, briefings, and other events for members and guests to share information, experiences, and best practices and to debate public-health issues. JA131-132.

B. The Leadership Act And The Policy Requirement

Congress passed the Leadership Act "to strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases." 22 U.S.C. § 7603. The Act outlines a comprehensive set of strategies to improve the treatment of HIV/AIDS, to care for those affected by the disease, and to prevent the disease's further spread. *Id.*; *see id.* § 7611(a). The Act takes a multifaceted, all-inclusive approach. With respect to HIV prevention, for example, the Act supports numerous strategies ranging from counseling on abstinence, monogamy, and faithfulness to education on the proper use of condoms. *Id.* § 7611(b)(2)(K). As President Bush explained when signing the Act:

> Under this legislation, America will ... prevent mother-to-child transmission[;] ... purchase

> low-cost anti-retroviral medications[;] ... set up a broad and efficient network to deliver drugs to the farthest reaches of Africa[;] ... train doctors and nurses and other health care professionals [to] treat HIV/AIDS patients[;] ... renovate and ... build and equip clinics and laboratories[;] ... support the care of AIDS orphans by training and hiring child care workers[;] ... provide home-based care to ease the suffering of people living with AIDS[;] ... provide HIV testing[;] ... support abstinence-based prevention education for young people[;] ... assist faith-based and community organizations to provide treatment, prevention, and support services[;] ... [and] ... develop[] a system to monitor and evaluate this entire program, so we can truly say to people, "We care more about results than words."

CAJA377.

To achieve these purposes, Congress has appropriated billions of dollars to support the work of NGOs engaged in HIV/AIDS treatment and prevention overseas. Congress found in the Leadership Act that the federal government's partnerships with such organizations have been "critical to the success of ... efforts to combat HIV/AIDS," 22 U.S.C. §§ 7603(4), 7621(a)(4), and should be sustained and expanded, including by "combining financial and other resources, scientific knowledge, and expertise," *id.* § 7621(a)(3).

To qualify for Leadership Act funds provided through petitioner United States Agency for International Development (USAID), organizations must meet "[a]uthorizing legislation and governing program requirements," USAID, ADS 303.3.6.2.a (2012), *available*

at http://transition.usaid.gov/policy/ads/300/303.pdf, including, for example, by demonstrating "[t]echnical merits," "[c]ost effectiveness," and "[p]ast performance," *id.* at 303.3.6.3 (Evaluation Criteria). To demonstrate past performance, "[a]n applicant must provide a list of all its contracts, grants, or cooperative agreements involving similar or related programs during the past three years." *Id.* at 303.3.6.3.a; *see also* JA173-174 (citing ADS 303.3.6.3 and USAID, *Request for Applications Number USAID-Tanzania-08-001-RFA*, at 5, 18 (CAJA831, 833)); *see also* 22 U.S.C. § 2151u(a) (organizations should demonstrate "capacity to undertake effective development activities"); JA102, 106-107, 165; CAJA699-700. Organizations must also have been incorporated for at least 18 months, 22 C.F.R. § 203.3(f)(4); *see also* JA173, and receive at least 20 percent of their funding from sources other than the U.S. government, *see* CAJA770 (USAID Frequently Asked Questions); USAID, *USAID Primer* 24, http://transition.usaid.gov/about_usaid/PDACG100.pdf (2006).[1]

The Leadership Act places certain conditions on recipients' use of funds. For instance, section 7631(e) bars recipients from using Leadership Act funds "to

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[1] These last two requirements apply to respondents and organizations like them because they are considered "Private Voluntary Organizations," meaning that they are U.S. nonprofit organizations that receive private funding and conduct foreign assistance programs abroad. *See* 22 C.F.R. § 203.3; USAID, *PVO Registration Frequently Asked Questions*, http://idea.usaid.gov/ls/pvo/faq (last visited Mar. 27, 2013) ("PVOs are required to be registered in order to be eligible to compete for development assistance grants and cooperative agreements."). Similar rules apply to foreign nonprofits. *See* 22 C.F.R. § 203.6.

promote or advocate the legalization or practice of prostitution or sex trafficking." But the provision at issue in this case—the "Policy Requirement"—imposes a further condition that is not tied to the use of Leadership Act funds; rather, it affects each recipient on an entity-wide basis:

> No funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

22 U.S.C. § 7631(f). Implementing regulations require the policy to be included in all sub-agreements entered into by the recipient and assert the government's right to inspect the recipient's books and records to assess compliance with the Policy Requirement. *See* 70 Fed. Reg. 29,759-29,760 (May 4, 2005); *see also* JA125. As implemented by petitioners USAID and the United States Department of Health and Human Services, the Policy Requirement additionally prohibits recipients from "engag[ing] in activities inconsistent with ... opposition to the practices of prostitution and sex trafficking," even when using private funds. Pet. App. 297a-298a, 309a. Neither the Leadership Act nor the implementing regulations define the types of speech or activities that would be deemed "inconsistent with" an opposition to prostitution.

The Act allows four organizations to receive Leadership Act funds without complying with the Policy

Requirement and attendant regulations. 22 U.S.C. § 7631(f). Three of these organizations are international agencies, while the fourth—the International AIDS Vaccine Initiative—is a U.S.-based NGO that not only develops HIV vaccines but also builds clinics, trains staff, and provides HIV/AIDS testing and counseling through programs in the field. CAJA407-408; IAVI, *Where We Work*, http://www.iavi.org/Where-We-Work/Scientific-Network/Clinical-Research-Centers/Pages/default.aspx (last visited Mar. 27, 2013). The statute also provides that organizations need not endorse or participate in every program or activity of the comprehensive strategy adopted by the Leadership Act, but may receive funds to undertake some efforts against HIV/AIDS while opting out of or disagreeing with other programs or activities on the basis of a "religious or moral objection." 22 U.S.C. § 7631(d)(1). There is no opt-out provision for the Policy Requirement.

Aside from the Policy Requirement and the funding restriction in section 7631(e), the Leadership Act refers to prostitution only twice. In one of the Act's 41 findings, Congress found that prostitution degrades women and contributes to the spread of HIV/AIDS and that "it should be the policy of the United States to eradicate such practices." 22 U.S.C. § 7601(23). Another section includes within one of the Act's 29 strategies the education of men and boys about the risks of procuring sex commercially and the support of alternative livelihoods for commercial sex workers. *Id.* § 7611(a)(12). Although the eradication of prostitution was previously included among the Act's enumerated strategies, *see* Pub. L. No. 108-25, § 101(a)(4), 117 Stat. 711, 718 (2003), Congress removed that language in

2008, *see* Pub. L. No. 110-293, § 101(a), 122 Stat. 2918, 2923-2927 (2008).

C. The Policy Requirement's Impact On Respondents

Respondents do not support or wish to support prostitution. *E.g.*, JA97, 102, 116, 137. Respondents nonetheless would not have adopted policies expressly opposing prostitution absent the Policy Requirement. *See, e.g.*, JA150, 163. Because they focus on public health—operating clinics, training doctors, importing medications, and the like—and operate in countries with disparate laws and social norms, respondents typically "make every effort to remain neutral on issues of political or cultural conflict." JA96; *see* JA115, 127, 138, 164. When respondents do adopt a particular policy, they do so based on the merits of the policy, in most cases only after studying the issue and determining that the policy would promote a desired health outcome. JA115, 127, 138, 164.

As respondents explained in declarations supporting their preliminary-injunction motion, the Act's requirement that they adopt a policy explicitly opposing prostitution harms them in at least three ways. *First*, espousing an anti-prostitution policy diminishes the effectiveness of some public-health programs by making it more difficult to organize, educate, and motivate sex workers in the fight against HIV/AIDS. The policy chills communication and cooperation with the very individuals whose trust and cooperation is critical to respondents' efforts to combat HIV/AIDS. As HIV/AIDS experts and public-health authorities have recognized, organizing and working cooperatively with sex workers is often necessary not only to provide care to those individuals, but also to educate them about the

importance of HIV-prevention methods, recognizing that the rates of infection and multiplicity of partners among sex workers contribute to the spread of HIV "into the general population." CAJA55; *see also* 149 Cong. Rec. 11,804 (2003) (statement of Sen. Frist). If compelled to adopt a policy explicitly opposing prostitution, respondents' work with this critical population could be compromised. JA98, 102-103, 117-118, 127, 137, 152. Moreover, because the Policy Requirement would preclude respondents from doing anything "inconsistent" with a policy opposing prostitution—even with private funds—it is unclear whether respondents could continue the community-organizing efforts that lead to the adoption of safe-sex practices and other reforms that ultimately reduce the spread of HIV/AIDS. JA97, 128, 136-139, 150-153, 166-168; CAJA238-239, 389.

Second, adopting a policy explicitly opposing prostitution could complicate respondents' efforts to operate in countries with disparate legal regimes relating to prostitution. JA103, 115-116, 137-138. Maintaining the option of neutrality enables organizations to work in countries whose policies toward prostitution vary "from highly tolerant to harshly punitive," without alienating host governments. JA116; *see* JA120.

Third, the Policy Requirement would require respondents to censor their privately funded discussions about the best policies and practices on a range of topics, including how best to prevent the spread of HIV among sex workers. Respondents actively engage in such debates in publications, at conferences, and in policy arenas. The Policy Requirement would stifle that debate, even when undertaken only with private funds outside the scope of any government program. *See, e.g.*, JA105, 118-119, 128, 135-136, 152-154, 168-170. For example, although respondents and their members rec-

ognize the harms associated with prostitution, they nonetheless hold a range of opinions from a public-health perspective on whether legalization or decriminalization of prostitution might create the best opportunity to improve health and prevent HIV transmission in that population. *See* JA97, 128, 135. The government has indicated, however, that advocating for the legalization of prostitution would violate the Policy Requirement. Pet. App. 131a, 133a. The Policy Requirement, if imposed, would preclude respondents from engaging in debate—even privately funded debate—on that subject and related public-health issues "for fear of being barred from federal HIV/AIDS funds." JA136; *see* JA128, 135.

D. Procedural History

For more than a year after the Leadership Act's enactment, the government did not enforce the Policy Requirement against U.S.-based NGOs because the Department of Justice's Office of Legal Counsel had opined that it "cannot be constitutionally applied to U.S. organizations." Opp. App. 2a. OLC noted that the "organization-wide restrictions" would "prevent or require certain advocacy or positions in activities completely separate from the federally funded programs." *Id.*; *see* Pet. App. 127a-128a. In 2005, OLC changed its view, and the government began enforcing the Policy Requirement against U.S.-based NGOs shortly thereafter. Pet. App. 128a-129a, 132a-134a.

AOSI and Pathfinder filed this action in September 2005 and immediately sought to enjoin enforcement of the Policy Requirement on First Amendment grounds. In May 2006, the district court entered a preliminary injunction that remains in place today. Pet. App. 112a-219a. Addressing respondents' "as applied challenges,"

Pet. App. 137a, the court first agreed with the government's interpretation of the Policy Requirement as both requiring recipients to have a policy explicitly opposing prostitution and prohibiting recipients from engaging in activities "inconsistent" with that policy, even with private funds. Pet. App. 139a-162a. The court then held that respondents were likely to succeed on their claim that the Policy Requirement violates the First Amendment. Pet. App. 163a-214a. The court also found that enforcement of the Policy Requirement would irreparably harm respondents by chilling their speech and undermining their work with sex workers in vulnerable communities. Pet. App. 217a-219a.

The government appealed. At oral argument, the government announced its intent to issue new implementing regulations. Those regulations, issued in July 2007, allowed grantees to affiliate with legally separate organizations that could engage in "activities inconsistent with a policy opposing prostitution," so long as the recipients maintained "objective integrity and independence" from those affiliates. 72 Fed. Reg. 41,076 (July 26, 2007); *see* Pet. App. 224a-226a. Leaving the preliminary injunction in place, the court of appeals remanded the case for reconsideration in light of the new regulations. *See Alliance for Open Society Int'l, Inc.* v. *USAID*, 254 F. App'x 843 (2d Cir. 2007).

On remand, the district court held that the new regulations did not cure the Policy Requirement's constitutional defects. Pet. App. 241a-250a.[2] The court noted that "the clause requiring [respondents] to adopt

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[2] The court also allowed InterAction and GHC to join the case and expanded the preliminary injunction to protect their members.

the government's view regarding the legalization of prostitution remains intact" and that compliance with the regulations' affiliate-separation requirements would be excessively burdensome. Pet. App. 242a, 246a-250a.

The government again appealed. In April 2010, while the appeal was pending, HHS and USAID issued revised implementing regulations, which remain in place today. *See* Pet. App. 297a-298a, 299a-336a (2010 Guidelines). The 2010 Guidelines require that each Leadership Act grantee "affirmatively state in the funding document that it is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children" and reaffirm that a recipient "cannot engage in activities that are inconsistent with [its] opposition to prostitution." Pet. App. 11a (internal quotation marks omitted); *see also* Pet. App. 308a-309a. Like the previous regulations, the 2010 Guidelines do not indicate what activities may be deemed "inconsistent" with an "opposition to prostitution." Pet. App. 11a (internal quotation marks omitted).

The 2010 Guidelines maintain the requirement that Leadership Act grantees must have "objective integrity and independence" from any affiliate engaged in activities inconsistent with an opposition to prostitution. Pet. App. 297a, 309a. Under the Guidelines, the government assesses "objective integrity and independence" under a non-exclusive five-factor test that considers: (1) whether the affiliate is a legally separate entity; (2) whether the affiliate has separate personnel or some other allocation of personnel that maintains "adequate" separation; (3) whether the affiliate has separate accounting and timekeeping records; (4) the degree of separation between the recipient's facilities and facili-

ties where "restricted activities" occur; and (5) the extent to which signs and other forms of identification distinguish the recipient from the affiliate. Pet. App. 298a, 310a.

In July 2011, a divided panel of the Second Circuit affirmed the preliminary injunction. Pet. App. 1a-96a. The court held that the Policy Requirement "falls well beyond" any funding condition previously upheld by this Court because it mandates that recipients affirmatively espouse the government's position "as if it were their own." Pet. App. 25a, 31a. The court rejected the government's reliance on the government-speech doctrine, Pet. App. 30a-35a, and held that the 2010 Guidelines failed to cure the constitutional violation, Pet. App. 35a-36a. Judge Straub dissented. Pet. App. 37a.

On February 2, 2012, the court of appeals denied the government's petition for rehearing en banc, over the dissent of three judges. Pet. App. 97a-111a.

SUMMARY OF ARGUMENT

I. The Policy Requirement imposes an unconstitutional condition by mandating that recipients of government funds adopt and express the government's viewpoint as their own and by prohibiting recipients from engaging in any speech—even if privately funded—that the government deems "inconsistent" with its orthodoxy. There can be no question that such a law, if imposed by direct regulation, would be unconstitutional. And this Court has made clear that, where the government is prohibited from infringing on protected speech through direct regulation, it may not achieve the same result indirectly by imposing a condition on government benefits.

The unconstitutional-conditions doctrine applies just as robustly when the government acts pursuant to its spending power. Thus, in *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), and *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), this Court invalidated conditions on federal funding under the First Amendment, even though the funding recipients could have avoided any restriction on their speech simply by forgoing the federal funds. The government relies on *Rust* v. *Sullivan*, 500 U.S. 173 (1991), but that decision only confirms that, although the government may ensure that federal funds are *used* for their intended purpose, it may not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197.

Under this precedent, the Policy Requirement cannot stand. The Policy Requirement compels grantees to espouse the government's viewpoint on an important public-health issue, even if they do not agree with it or prefer to take no position, without affording them the freedom to form and express their own judgments on the issue. The Policy Requirement also restricts what grantees may say when speaking with their private funds, outside the scope of the federal program. Indeed, the government concedes that the Policy Requirement's very purpose is to prevent grantees from using their private funds to engage in speech that it deems "inconsistent with" or indifferent toward the government's view. The result is to deprive the marketplace of ideas of the views of many who are most likely to be knowledgeable about the public-health issue at hand. This Court has never upheld a funding condi-

tion like this one that imposes an entity-wide, viewpoint-based restriction on a grantee's private speech.

II. The Policy Requirement cannot be upheld under the government-speech doctrine. When an organization adopts the policy opposing prostitution, it is required to make that statement on its own behalf, not on behalf of the government. As the government concedes, respondents have not been enlisted to disseminate a government message to any audience. Rather, the Policy Requirement requires recipients to adopt an anti-prostitution policy as their own and convey it only to the government. The Policy Requirement entails no government speech at all.

Citing *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995), the government argues (at 21-22) that the Policy Requirement is a "'legitimate and appropriate means'" of "'ensur[ing] that its [anti-prostitution] message is neither garbled nor distorted by the grantee.'" But even if some Leadership Act grantees conveyed an anti-prostitution message on behalf of the government—and the government identifies none—it would not be "legitimate and appropriate" to require those grantees to adopt the government's viewpoint on an organization-wide basis, much less to impose that requirement on grantees like respondents that are not enlisted as government speakers. The government-speech doctrine permits the government to control its own speech and to contract with private parties to convey its message, but it cannot be used as a pretext for controlling the viewpoints of all recipients of federal funding.

Nor is the Policy Requirement necessary to advance any government message or protect the integrity of a separate government anti-prostitution policy. The

Policy Requirement has not been enforced against respondents for years—first because OLC originally believed it unconstitutional and then because it was enjoined below—and some of the government's largest partners are exempt from the Policy Requirement altogether. Yet the government points to no evidence that its policy opposing prostitution has suffered as a result or that its projects to eradicate prostitution, whatever they may be, have suffered from any confusion as to the government's position. Meanwhile, the government and its NGO partners have worked together effectively to combat HIV/AIDS for nearly a decade.

III. The affiliate regime established by the 2010 Guidelines does not cure the Policy Requirement's constitutional defects. When a recipient of federal funding is compelled to adopt and express the government's viewpoint as its own, that injury cannot be undone by allowing a separate affiliate to remain silent. By the same token, even if the separate affiliate may engage in its own speech "inconsistent" with the government's viewpoint, the grantee remains subject to an entity-wide, viewpoint-based restriction on its privately funded speech. The government's proposed solution—that respondents create "special-purpose affiliates" to receive federal funding and comply with the Policy Requirement—simply shifts that constitutional injury to the affiliate and would still leave respondents in the position of having been denied federal funds because they exercised their First Amendment right to free speech.

The affiliate regime is also unworkable as a practical matter. Grantees that accept Leadership Act funds but do not wish to give up their speech rights would have to set up new affiliates in every country in which they operate. That process is extraordinarily burden-

some, requiring grantees to navigate complicated or even unwelcoming foreign bureaucracies and make wasteful expenditures on duplicative staff, equipment, and office space. Without a track record of their own, and unable to rely on the main organization's reputation and brand, the newly created affiliate would find it difficult or impossible to obtain funding. The vagueness of the Guidelines only amplifies these burdens. The 2010 Guidelines thus fail to provide an adequate alternative channel for the free expression that the Policy Requirement prohibits.

ARGUMENT

I. THE POLICY REQUIREMENT IMPOSES AN UNCONSTITUTIONAL CONDITION ON GOVERNMENT FUNDING

A. The First Amendment Bars The Government From Imposing Conditions On Government Funding That Prohibit Or Compel Private Speech

The government does not and cannot dispute that the Policy Requirement, if imposed as a direct regulation, would violate the First Amendment. The government nonetheless advocates a radically expansive view of its spending power, under which it can disregard the First Amendment and compel citizens, as a condition of obtaining public funds, to give up their right to choose what they say even in the context of their privately funded speech and activities. This argument cannot be reconciled with this Court's longstanding precedent that the government may not manipulate the granting of benefits "to 'produce a result which [it] could not command directly.'" *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)) (alteration in original); *see also Elrod* v. *Burns*, 427 U.S. 347, 361 (1976)

(government cannot use discretion over benefits to "creat[e] an incentive enabling it to" limit the exercise of constitutional rights).

This Court has consistently held that "[g]overnmental imposition of ... a choice" between forgoing benefits and relinquishing constitutional rights can violate the First Amendment no less than direct regulation. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). "[E]ven though a person has no 'right' to a valuable governmental benefit," and even though he may choose to forgo it, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry*, 408 U.S. at 597. Denying a benefit because of a person's protected speech "in effect ... penalize[s] and inhibit[s]" that speech. *Id.*; *see also Sherbert*, 374 U.S. at 405-406. Thus, it is unconstitutional for the government to "condition[] hiring decisions on political belief and association" with a particular political party, even though applicants can avoid the condition by simply choosing not to seek public employment. *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 78 (1990). Similarly, the government cannot force the unemployed to choose between working on Saturday, in violation of their religious beliefs, and losing eligibility for unemployment benefits. *Sherbert*, 374 U.S. at 406. Were the government correct that it could freely force recipients of public benefits to choose between forfeiting benefits and accepting restrictions on their First Amendment rights, these unconstitutional-conditions cases would have been decided the other way. Instead, this Court has made clear that "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing in-

directly" by imposing conditions on discretionary benefits. *Rutan*, 497 U.S. at 77-78.

The unconstitutional-conditions doctrine applies equally when Congress acts pursuant to its power under the Spending Clause. Thus, in *FCC* v. *League of Women Voters of California*, 468 U.S. 364, 399-402 (1984), this Court invalidated a funding condition that banned editorializing by non-commercial broadcast-television stations, even though the stations could avoid the restriction by forgoing federal funding. Similarly, in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 542-549 (2001), the Court invalidated a condition on the use of federal funds for civil legal-aid services because it violated the First Amendment rights of grantees and their clients. As these cases demonstrate, nothing in the Spending Clause immunizes government action from First Amendment scrutiny.[3]

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[3] The government cites (at 17) *South Dakota* v. *Dole*, 483 U.S. 203 (1987), but the Court there simply recognized that Congress may use the spending power to achieve objectives that lie beyond its enumerated legislative powers. *Id.* at 207 (spending power "'is not limited by the direct grants of legislative power'"). *Dole*—which addressed only federalism standards for assessing conditions on federal funding to States—did not hold that the Spending Clause creates a First Amendment-free zone. To the contrary, it recognized that "other constitutional provisions may provide an independent bar" to particular conditions. *Id.* at 208. The government's other authorities are also inapposite. In *United States* v. *American Library Ass'n*, 539 U.S. 194, 203 n.2 (2003), the question was whether a condition on federal funding to State-run public libraries would cause the libraries unconstitutionally to restrict the First Amendment rights of library patrons, where the restriction in question was intended to protect children and was easily avoided by adults. And, contrary to the government's contention, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587

Congress's authority under the Spending Clause does entail the "ancillary power to ensure that ... funds are properly applied to the prescribed use." *Rust* v. *Sullivan*, 500 U.S. 173, 195 n.4 (1991). This Court has accordingly upheld conditions on federal funding that serve "to ensure that the limits of the federal program are observed" and that government funds are not expended "outside the scope of the federally funded program." *Id.* at 193. In *Rust*, for example, the Court upheld a funding condition that prohibited grantees from "engaging in activities outside of the project's scope" when using federal funds. *Id.* at 194. Similarly, in *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983), the Court upheld Congress's power to choose not to "pay for ... lobbying out of public monies" and to condition an organization's eligibility for tax-exempt status in accordance with that choice. *See also United States* v. *American Library Ass'n*, 539 U.S. 194, 211-212 (2003); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998). Under these decisions, it was permissible for Congress to provide in the Leadership Act that federal funds may not be used "to promote or advocate the legalization or practice of prostitution or sex trafficking," 22 U.S.C. § 7631(e), and respondents have never challenged that provision.

Crucially, however, the Court has never upheld a speech restriction that reached beyond the limited purposes of ensuring that government programs are properly administered and that government funds are applied to their intended use. Congress's "ancillary

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(1998), recognized that the First Amendment "certainly ... appli[es] in the subsidy context."

power" to impose such restrictions does not include the much broader power to control what recipients of government funds say and do with their *private* funds or to dictate what views recipients must hold and express when acting outside the scope of the federal program. Thus, although Congress could prohibit a grantee from engaging in abortion-related speech or activity when using federal funds, it could not "den[y] [the grantee] the right to engage in abortion-related activities" altogether. *Rust*, 500 U.S. at 198. As the Court explained, it would be unconstitutional for the government to "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Id.* at 197; *see also* Resp. Br. 20-21, 27, 30, *Rust*, 500 U.S. 173 (Nos. 89-1391 & 89-1392), 1990 WL 10012655. Nor does the spending power entail the authority to "suppress[] ... disfavored viewpoints." *Finley*, 524 U.S. at 587.

Where Congress has exceeded its power to prevent misuse of government funds, and where funding conditions restrict or compel speech in ways that could not be accomplished by direct regulation, this Court has not hesitated to invalidate funding conditions as unconstitutional. Thus, this Court struck down the ban on editorializing in *League of Women Voters* because it barred the recipients from editorializing on the air completely, even when using private funds. 468 U.S. at 400. Although Congress could decline to subsidize editorials, it could not "bar[] [recipients] absolutely from all editorializing." *Id.*; *see also Finley*, 524 U.S. at 587 ("even in the provision of subsidies, the Government

may not 'ai[m] at the suppression of dangerous ideas' (quoting *Regan*, 461 U.S. at 550)).[4]

In short, the Spending Clause does not empower Congress to impose conditions that prohibit the recipients of federal funding from speaking or compel them to speak in ways that could not be accomplished through direct regulation. That result is true to the principle that Congress cannot, by virtue of conditions on benefits, indirectly "place limitations upon the freedom of speech which if directly attempted would be unconstitutional." *See Speiser*, 375 U.S. at 518; *cf. Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (*FAIR*) (condition that schools receiving federal funding grant access to military recruiters "would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students").

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[4] The government cites (at 17) this Court's observation in *Finley* that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake," 524 U.S. at 587-588, but it makes no serious argument that the Policy Requirement operates as a subjective selection criterion akin to the "esthetic judgments" applied to particular art projects by the NEA, *id.* at 586. Moreover, as the government's brief makes clear (*e.g.*, at 6-7, 15, 22, 27-28, 44), the government does not use the Policy Requirement to select anti-prostitution projects or organizations that have standing policies opposing prostitution. Rather, grantees are selected for other reasons, including their track records of effectiveness in fighting HIV/AIDS, *see supra* pp. 7-8, and comply with the Policy Requirement "simply by accepting federal funds" and "signing award documents" that recite the policy, Pet. Br. 44; *see id.* 6-7.

B. The Policy Requirement Is An Unconstitutional Condition

When the unconstitutional-conditions doctrine is applied as this Court has consistently applied it in cases like *League of Women Voters* and *Rust*, the unconstitutionality of the Policy Requirement becomes plain. The Policy Requirement both compels speech and restricts privately funded speech in a manner that unquestionably could not be sustained if imposed through direct regulation.

1. The Policy Requirement unconstitutionally compels grantees to adopt the government's viewpoint and express it as their own

At the core of the Policy Requirement is a condition never before countenanced in this Court's jurisprudence: a "mandate[] that recipients affirmatively *say* something." Pet. App. 25a. Demanding "affirmation of a belief and an attitude of mind" precludes freedom of thought, *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633 (1943), and distorts the marketplace of ideas, *see Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Accordingly, "[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say," *FAIR*, 547 U.S. at 61, for "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State," *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); *see also Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994); *Wooley* v. *Maynard*, 430 U.S. 705,

715 (1977). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

The Policy Requirement prescribes what recipients of government funds must say and profess to believe in order to receive Leadership Act funds. It forces respondents to adopt and express a view on an important public-health issue that they may not agree with or simply may not wish to express. It deprives respondents of the freedom to determine and hold their own views on the issue and to form their own judgments about whether and how to express those views. The government does not dispute that it could not constitutionally impose such a requirement by direct regulation. The government is therefore barred from imposing the same requirement indirectly by means of a condition on federal funding. *See supra* pp. 20-25.

Even in cases where this Court has upheld funding conditions that restrict speech, it has relied specifically on the fact that the condition did not compel a private statement of agreement with the government's views. In *Rust*, for example, the Court emphasized that "[n]othing in [the regulation] requires a doctor to represent *as his own* any opinion that he does not in fact hold." 500 U.S. at 200 (emphasis added). Similarly, in *FAIR*, the Court explained that the Solomon Amendment "neither limit[ed] what law schools may say nor require[d] them to say anything." 547 U.S. at 60. Distinguishing *Barnette* and *Wooley*, the Court emphasized that the statute at issue in *FAIR* "d[id] not dictate the content of the speech at all" and that "[t]here [wa]s nothing in this case approaching a Government-

mandated pledge or motto that the [grantee] must endorse." *Id.* at 62. Here, by contrast, a "Government-mandated pledge" is precisely what the Leadership Act imposes.

The government responds (at 41) that grantees are not "compelled to do anything" because the compulsion exists only "as a result of their own choice to accept federal funds." (Emphasis omitted.) But that simply repeats the same mistaken premise that pervades the government's brief. The fact that a recipient may choose to forgo federal funding does not permit the government to disregard the First Amendment when imposing funding conditions that restrict even privately funded speech. *Supra* pp. 20-25. That theory did not save the funding conditions struck down in *League of Women Voters* or *Velazquez*, and it cannot do so here.

Citing *Riley*, the government also argues (at 33-36) that the court of appeals erred in distinguishing the Policy Requirement's compulsion of speech from the conditions upheld in *Rust* and *Regan*. But the cited language in *Riley* merely rejected the argument that the First Amendment provides less protection against compelled speech than it does against compelled silence. *See* 487 U.S. at 796 (holding that both are offensive to free speech). *Riley* did not confront, much less uphold, a funding condition like the one here that both compels the adoption of government orthodoxy and prohibits any contrary expression, thus completely depriving the recipient of the freedom to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641.

2. The Policy Requirement unconstitutionally suppresses private speech based on the speaker's viewpoint

In addition to compelling recipients to adopt and express a "policy explicitly opposing prostitution," the Policy Requirement prohibits grantees from engaging in speech or activities the government deems "inconsistent" with its chosen viewpoint. *Supra* p. 9; Pet. App. 3a. This requirement independently violates the First Amendment for two related reasons.

First, the Policy Requirement impermissibly restricts privately funded speech. As noted, respondents receive substantial funding from private donors and other sources in addition to Leadership Act grants. *Supra* pp. 4-6; *see* JA96-97. The Policy Requirement, however, applies to any "group or organization" that receives Leadership Act funding. 22 U.S.C. § 7631(f). Accordingly, the moment an organization receives one dollar of Leadership Act funds, the entire organization—including all of its programs worldwide, whether HIV/AIDS-related or not, and whether government-funded or not—becomes subject to the Policy Requirement and the prohibition on "inconsistent" speech and activities. Indeed, the government acknowledges that the very purpose of the Policy Requirement is to prevent recipients from expressing "a contrary message with their *private funds*." Cert. Reply 8 (emphasis added); *see also, e.g.*, Pet. Br. 20, 27.

In *Rust*, this Court explained that the unconstitutional-conditions doctrine prohibits the government from "plac[ing] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the feder-

ally funded program." 500 U.S. at 197. Distinguishing *Perry* and *League of Women Voters*, the Court upheld the regulations at issue in *Rust* because they "govern[ed] the scope of the Title X *project's* activities, and le[ft] the grantee unfettered in its other activities." *Id.* at 196. Here, unlike *Rust* but like *Perry* and *League of Women Voters*, a Leadership Act recipient must "give up ... speech" the government finds inconsistent with an opposition to prostitution, even when engaging in activities independent of the federally funded program. *Id.* Nothing in the government's authority to "insist[] that public funds be spent for the purposes for which they were authorized" permits the government to restrict private speech outside of the federal program altogether. *Id.*; *see also League of Women Voters*, 468 U.S. at 400.

Second, the Policy Requirement unconstitutionally suppresses speech expressing a disfavored point of view. In general, a "government regulation may not favor one speaker over another," *Rosenberger* v. *Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995), especially when doing so threatens to "drive certain ideas or viewpoints from the marketplace," *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *see also, e.g.*, *Knox* v. *Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012) ("The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves."); *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 431 (1992) (where a law seeks "to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (internal quotation marks omitted)); *Rosenberger*, 515 U.S. at 828 ("Discrimination against speech because of its message is

presumed to be unconstitutional."); *Regan* v. *Time, Inc.*, 468 U.S. 641, 648-649 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

The First Amendment's prohibition on viewpoint discrimination is no less robust when Congress exercises its spending power. "'[I]deologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts.'" *Rosenberger*, 515 U.S. at 830. Thus, "[w]here private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S. at 548-549; *see also Finley*, 524 U.S. at 587 ("[E]ven in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.'"). This Court has accordingly invalidated conditions on benefits that aimed to suppress the expression of disfavored views. *See, e.g.*, *Velazquez*, 531 U.S. at 548-549. And in cases where the Court has upheld funding conditions, it has emphasized the absence of any "indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." *Regan*, 461 U.S. at 548. Thus, the restriction upheld in *Rust* did "not discriminate[] against viewpoints on abortion" and "did not single out a particular idea for suppression because it was dangerous or disfavored." *Velazquez*, 531 U.S. at 541. Similarly, in upholding the funding condition in *Finley*, the Court noted that it would have "confront[ed] a different case" if the government had "leverage[d] its power to award subsidies ... into a penalty on disfavored viewpoints." 524 U.S. at 587; *see also id.* ("a more pressing constitutional question would arise if Government funding re-

sulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace'").

Here, the Policy Requirement imposes an impermissible viewpoint-based restriction on speech. *See Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (a restriction is viewpoint-based if it regulates speech "because of disagreement with the message it conveys"). Recipients are free to assert views and undertake activities with which the government agrees, but may not engage in speech or conduct the government deems "inconsistent" with an opposition to prostitution. Indeed, the government admits (at 20) that the goal of the Leadership Act's entity-wide prohibition on "inconsistent" speech is to prevent grantees from "advanc[ing] an opposite position" to the government's, using private funds. *See also* Pet. Br. 22, 24, 27; Cert. Reply 5, 8. This is the definition of viewpoint discrimination aimed at disfavored views.[5]

The consequence of the Policy Requirement, if imposed, would thus be to silence NGOs with views that differ from the government's and to drive their viewpoints from the marketplace of ideas. In addition to their public-health field work, respondents regularly use private funds to engage in academic conferences and panel discussions (JA128, 169), publish books and training manuals (JA168-169), and discuss issues with

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[5] To the extent the government suggests (at 13, 15-16, 37, 39) that respondents have waived this argument, that is plainly incorrect. Respondents argued in the lower courts that the Policy Requirement violates the First Amendment in part by seeking to suppress disfavored views. *See, e.g.*, Appellee C.A. Br. 38-39 (Dec. 14, 2006); Appellee C.A. Br. 4, 30, 33-34 (Sept. 8, 2010).

their member organizations (JA134-135). Under the Policy Requirement, respondents would be prohibited from participating in the ongoing public debate in these fora about how best to improve sex workers' access to health care and to deal with the public-health consequences of prostitution. The government's asserted authority, if wielded in this litigation, would even prohibit one of the amicus briefs filed in support of the government in this Court. The brief filed by the Coalition Against Trafficking in Women states (at 33) that amici "are firmly opposed to placing criminal penalties or stigma of any kind upon prostituted persons." As the court of appeals explained, that "contested public issue" is the subject of ongoing "international debate." Pet. App. 29a. The government, however, has taken the position that the Policy Requirement prohibits "advocacy for the elimination of criminal penalties against women engaged in prostitution." JA137-138; *see also* Def. Opp. to Mot. for Prelim. Inj. 13 (Dkt. No. 27). Under the Policy Requirement, recipients of Leadership Act funds thus could not take the position advanced in that amicus brief for fear of losing federal funding.

As a result, the Policy Requirement would silence those organizations that, by virtue of their public-health expertise and field work, are among the most experienced and knowledgeable about working effectively with populations that are highly vulnerable to infection, including sex workers, in the fight against HIV/AIDS. Leadership Act recipients make up a major portion of the marketplace of ideas on these public-health issues. Without their participation, the public debate will be less diverse and robust. By compelling grantees to embrace the government's orthodoxy and refrain from expressing "inconsistent" views, even in privately funded contexts, the Policy Requirement

"harm[s] not only" respondents "but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003).

The government makes no attempt to identify an interest substantial enough to justify these intrusions on free speech if imposed as a direct regulation, and they accordingly cannot be imposed indirectly through a condition on federal funding. *Supra* pp. 20-25.[6] Although the government disclaims (at 36) a view of the spending power that lacks "First Amendment limits," it reverts in the same breath (at 37) to the position that those limits are not exceeded so long as organizations "remain free to advocate for, or be neutral toward, prostitution and sex trafficking" simply by turning down federal funds. That supposed "limit[]" provides no limit at all and cannot be squared with this Court's unconstitutional-conditions precedents.

II. THE POLICY REQUIREMENT CANNOT BE UPHELD UNDER THE GOVERNMENT-SPEECH DOCTRINE

A. The Policy Requirement Is Not "Government Speech" And Respondents Are Not Government Speakers

Although the government may dictate the content of speech when the government itself "is the speaker or ... enlists private entities to convey [the government's] own message," *Rosenberger*, 515 U.S. 833, it cannot control the content of private speech that is not made

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[6] As discussed below, the Policy Requirement is not necessary to the effectiveness of the Leadership Act or to the integrity of the government's own opposition to prostitution. *See infra* Part II.B.

by or on behalf of the government, *see, e.g.*, *Velazquez*, 531 U.S. at 542. That is the case here.

The Policy Requirement is not government speech. Rather, it dictates the content of speech recipients must adopt and express as their own view as a condition of receiving government funding. 22 U.S.C. § 7631(f). The government thus concedes (at 22) that the Policy Requirement requires a grantee to "agree in the award document that *it* opposes prostitution." (Emphasis added); *see also id.* 20 (Policy Requirement ensures that recipients themselves are not "indifferen[t] toward" prostitution); *id.* 22 (Policy Requirement "secure[s] a commitment by the recipient that *it* will adhere to the government's policy ... in *its* conduct and ... *its* expression (emphases added)); *id.* 27 (Policy Requirement "ensure[s] that funding recipients" themselves "adhere to" the government's viewpoint).

Nor does the Policy Requirement represent governmental speech "convey[ed]" or "transmit[ted]" by private speakers acting on the government's behalf. *Rosenberger*, 515 U.S. at 833. Respondents have not received public funds to deliver the government's anti-prostitution message. They receive public funds to implement HIV/AIDS-related programs to prevent and combat a deadly disease. *See supra* pp. 4-6. Thus, the government concedes (at 22) that the Policy Requirement "does not ... require [recipients] to actively disseminate [an anti-prostitution] policy to foreign nationals." *See also id.* 22 (Policy Requirement "does not in itself require a recipient to affirmatively volunteer to others ... an opposition to prostitution and sex trafficking"); *id.* 43 n.6 (recipients "are not required by Section 7631(f) to affirmatively express an opinion about prostitution and sex trafficking"); *id.* 44 (recipients are not required to "publicize their policy to third parties").

Rather, as the government acknowledges (at 44 n.6), the Policy Requirement requires recipients to adopt their own policy opposing prostitution and to express that policy "*to HHS and USAID*" as a condition of receiving federal funding. It does not "enlist[] private entities to convey" any message to any audience on behalf of the government. *Rosenberger*, 515 U.S. at 833.[7]

B. The Policy Requirement Is Not A Legitimate And Appropriate Means Of Protecting Any Government Message

Having conceded that the Policy Requirement itself is not government speech, the government proceeds (at 27-28) on the novel theory that this Court's government-speech doctrine nonetheless permits it to demand that all funding recipients commit themselves to the government's preferred ideology, even when the recipients have not been enlisted to convey any anti-prostitution message, so that the government may "advance [its] goal [of opposing prostitution] with consistency, force, and scope." That assertion does not justify the Policy Requirement's sweeping restriction of free speech.

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[7] The D.C. Circuit upheld the Policy Requirement on the assumption that "'the government's own message is being delivered'" and that grantees "must communicate the message the government chooses to fund." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762, 764 (D.C. Cir. 2007); *see also id.* at 763 n.5 ("[V]iewpoint discrimination raises no First Amendment concerns when the government is speaking."). As the government now concedes (*e.g.*, at 22, 27), that assumption was incorrect. *See supra* pp. 34-36.

1. Imposing an ideological purity test is not a "legitimate and appropriate" means of protecting the integrity of any government policy

As one of dozens of findings underlying the Leadership Act's comprehensive strategy, Congress stated that "it should be the policy of the United States to eradicate" prostitution. 22 U.S.C. § 7601(23). The government asserts (at 27) that "some recipients" of Leadership Act funds—but "only some"—will "actively convey that message by implementing federally funded projects aimed at reducing the commercial sex trade." The government does not identify any such messaging projects. *Cf.* CAJA377 (signing statement) ("'We care more about results than words.'"). Even assuming such projects exist, however, the Policy Requirement is not a permissible means of ensuring their efficacy or the integrity of the government's policy.

The government relies (*e.g.*, at 21-22) on *Rosenberger*, where this Court explained that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." 515 U.S. at 833. But *Rosenberger* nowhere suggested that "legitimate and appropriate steps" could include a viewpoint-based restriction that compels all grantees to adopt the government's viewpoint while at the same time prohibiting grantees—even in the context of privately funded programs—from engaging in speech or activities the government deems inconsistent with that viewpoint. The Court simply cited its discussion in *Rust* of the government's power to "insist[] that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196; *see Rosenberger*,

515 U.S. at 833 (citing *Rust*, 500 U.S. at 196-200). As discussed above, the power recognized in *Rust* does not entail the broader power to compel grantees to adopt a particular view as their own or to control the speech of grantees undertaken with private funds outside the four corners of the federally funded program. *Supra* pp. 23-24, 27, 29-31; *Rust*, 500 U.S. at 196-200; *League of Women Voters*, 468 U.S. at 399-401. And it certainly does not permit the government to "suppress[] ... ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S. at 549.

The government appears to believe that it may restrict the private speech of respondents and other grantees that have not been enlisted to convey any governmental message merely by asserting that it wishes to avoid undermining a message conveyed (if at all) by other organizations pursuing other programs in which respondents have no involvement. The Court has never upheld a restriction on private speech on such a rationale. In *Rust*, the government was permitted to control the content of speech only within the federal program, and only because recipients of the federal funds remained free to express their own views and pursue abortion-related activities when they were "not acting under the auspices of the Title X project." 500 U.S. at 198.[8]

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[8] Citing *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010), the government contends (at 27) that federal funding "could free nonfederal monies to be used to promote prostitution or sex trafficking." But *Humanitarian Law Project*—which addressed the unrelated question whether citizens have a constitutional right to "provide material support" (in the form of supportive speech) to terrorist organizations—held that whether organizations "meaningfully segregate support of their legitimate activities" from sup-

Moreover, requiring grantees to adopt a policy opposing prostitution cannot possibly be expected to "advance [the government's] goal with consistency, force, and scope," Pet. Br. 27-28, where, as here, most grantees have nothing to do with anti-prostitution programs or messages. Respondents have been enlisted by the government to fight the spread of HIV/AIDS, not to oppose or eradicate prostitution. Respondents have never sought or played any role in any messaging campaign to eradicate or oppose prostitution. Under these circumstances, it is neither legitimate nor appropriate for the government to seek to control respondents' speech. If Congress were permitted to require every recipient of government funds to pledge its agreement with the government's viewpoint on subjects outside the scope of their federally funded program, the government's power to regulate and control private speech would be dangerously expanded.

This Court's decisions in the government-employment context are instructive. Although the speech rights of government employees are diminished somewhat by virtue of their employment, this Court has held even in that context that a government employer's goal of ensuring employee efficacy or loyalty does not justify the imposition of viewpoint restrictions without regard to an employee's particular duties. In *Rutan*, for example, the Court held that the govern-

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port for impermissible activities "is an empirical question." *Humanitarian Law Project*, 130 S. Ct. at 2724. The government has cited no evidence that, without the Policy Requirement, respondents would inappropriately divert public funds to any prohibited purpose. If the mere fungibility of money sufficed to permit broad regulation of *private* speech of federally funded entities, then *League of Women Voters* would have been differently decided.

ment's interest in securing "employees who will loyally implement its policies" can justify screening for political views only in the case of very senior jobs that entail political duties. 497 U.S. at 74. That interest could otherwise be met by "discharging, demoting, or transferring" poor-performing staff. *Id.* The fact that some employees might legitimately be required to share the hiring authority's political affiliation in light of their particular duties has never sufficed to allow the government to require all employees to share that affiliation. Instead, the Court has examined the responsibilities of each employee to assess if the position could be conditioned on party affiliation. *See, e.g., O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 719-720, 726 (1996) (screening contractors for party affiliation is unconstitutional where employer cannot "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved"); *see also Rutan*, 497 U.S. at 79; *Elrod*, 427 U.S. at 368; *cf. Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996).[9]

Moreover, this Court has rejected outright the proposition that the government can advance its goals by conditioning public employment on the taking of oaths that restrict the freedom of speech, regardless of

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[9] The government relies (at 20) on *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), but that decision dealt with the distinct question whether the Fourth Amendment prohibited the U.S. Customs Service from requiring a drug test before certain classes of employees could be promoted or transferred to jobs involving drug interdiction efforts and other national security responsibilities. Even in that case, the Court held that the weight of the government's interest must be assessed with respect to the employees' particular duties. *Id.* at 678.

the employee's position or duties. Employment cannot "be conditioned on an oath that one ... will not engage[] in protected speech activities such as ... criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office." *Cole* v. *Richardson*, 405 U.S. 676, 680 (1972). This limitation on the government's authority to restrict the rights of its employees applies *a fortiori* in a case involving recipients of federal funding.[10]

The government contends (*e.g.*, at 31, 32) that it may limit federal funding to like-minded organizations that share the government's views "so that they will be reliable partners and emissaries" that will not "transmit the message in a way that distances themselves from it or even indicates their own lack of agreement with it." This argument ignores that recipients of Leadership Act funds, by the government's admission, do not act as "emissaries" at all and do not transmit any message on behalf of the government. *Supra* pp. 34-36. The government's "Just Say No" hypothetical (at 32) is thus off-point. The government may direct an actor to declare "Just Say No To Drugs" because the actor in that situation has been enlisted as a government spokesperson to convey a specific message, and "when

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[10] As this Court has explained, the "unconstitutional conditions precedents span a spectrum from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to ... recipients of small government subsidies" like those in *League of Women Voters*, "who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." *Umbehr*, 518 U.S. at 680.

the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833. Here, however, as the government concedes, respondents have not been enlisted for any such purpose.[11]

The government's other hypotheticals are similarly inapposite. The government would be well within its authority to adopt a policy calling for the eradication of apartheid, just as it has authority to call for the eradication of prostitution. *Cf.* Pet. Br. 32-33. The government could also prohibit its partners from using federal funds to support apartheid, *Rust*, 500 U.S. at 196-200, and it could enlist private organizations to transmit the government's message of opposition to state-sanctioned racial segregation, *Rosenberger*, 515 U.S. at 833. But the government could not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in" protected speech inconsistent with the government's views "outside the scope of the federally funded program." *Rust*, 500 U.S. at 197. Nor would such a condition be legitimate or appropriate. The government has ample tools to evaluate an organization's effectiveness in carrying out the goals of a federal program without demanding an expression of orthodoxy. *See infra* p. 45. Among those tools, the government could require an organization to meet performance standards or confirm its compliance with laws prohibiting racial discrimination. *Cf.* Pet. Br. 22. That is different from impermissibly requiring an organization to affirm a subjective belief in the value or correct-

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[11] As the district court noted, this case presents an as-applied challenge to the Policy Requirement. Pet. App. 137a-138a.

ness of those laws when the organization is not speaking on behalf of the government.

2. The Policy Requirement is unnecessary to advance the government's policy of eradicating prostitution

The government's novel application of the government-speech doctrine should be rejected for the additional reason that the record refutes any suggestion that the government's policy would be impeded if it could not suppress private speech or compel private actors to adopt its message as their own.

The government contends that Congress's goal would be undermined by allowing any recipient of Leadership Act funds—even those that do not disseminate any government message—to disagree with the government's opposition to prostitution or even to maintain a stance of neutrality or indifference on the subject. *E.g.*, Pet. Br. 20, 22, 23, 27. The terms of the Leadership Act and its implementation history both belie this assertion.

In 2004, Congress exempted some of the largest and most important public-health organizations in the world from the Policy Requirement's restrictions. *See* 22 U.S.C. § 7631(f) (exempting the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organizations, the International AIDS Vaccine Initiative (IAVI), and all United Nations agencies). In fiscal year 2012, these recipients collectively received more than 20 percent of all federal funding made available under the Leadership Act. *See* Henry J. Kaiser Family Foundation, *Budget Tracker* ll. 5, 11, 32, 42, http://www.kff.org/globalhealth/upload/8045_FY2013.pdf (2013). Yet they may accept those federal funds while continuing to take public positions at odds with the an-

ti-prostitution policy—which some of them have in fact done. *See* Pet. App. 33a. Thus, it is simply incorrect that Congress believed its purported anti-prostitution message could be effectively delivered only if all its partners were compelled to agree with it.

The government responds (at 31) that three of the four organizations are international bodies composed in part of sovereign states and that "Congress appropriately could decide not to attempt unilaterally to require those organizations to adopt policies opposing prostitution or sex trafficking." Of course, on the government's theory, these international bodies have a "choice" to forgo federal funds, just as respondents do. Yet the government does not explain why its anti-prostitution "message" is weighty enough to justify imposing that "choice" (or, in the government's words (at 31), "unilateral[] ... require[ment]") on U.S.-based organizations in disregard of their First Amendment rights, but not on foreign entities that have no such rights. Moreover, the fourth exempt organization, IAVI, is not a sovereign state, but an NGO that conducts field work similar to some of respondents'. *See supra* p. 10.

Even with regard to non-exempt organizations, there is no evidence the Policy Requirement has been necessary to the success of any government policy. The government chose not to enforce the Policy Requirement against U.S.-based NGOs for more than a year after its enactment, based on OLC's advice that it would be unconstitutional to do so. *Supra* p. 13; Opp. App. 1a-2a. Since OLC's change of position in 2005, the Policy Requirement has remained unenforced against respondents (since 2006, in the case of Pathfinder and AOSI, and 2008, in the case of InterAction and GHC) due to the preliminary injunction entered by the district court. Yet nothing in the record suggests that the

government's goals have been "undermined" or its policies "distorted" during this period. To the contrary, the government and respondents have achieved extraordinary success in the fight against HIV/AIDS and its root causes.

The government has numerous means available to it to ensure the effectiveness of its programs without violating the First Amendment rights of its partners. The government may establish (and has established) rigorous selection criteria requiring funding applicants to demonstrate a proven track record of success in combating HIV/AIDS. *Supra* pp. 7-8; *see also* JA173-174. As it does in any other government program, the government can supervise grantees' performance and audit their work to assess their achievement of the government's preferred goals and benchmarks. *See, e.g.*, CAJA439, 451, 469, 480. The government cannot, however, impose a funding condition that compels the grantee to adopt the government's viewpoint as its own and prohibits the grantee from taking any "inconsistent" view even with private funds.

III. The Affiliate Regime Does Not Cure The Policy Requirement's Constitutional Defects

The government finally contends (at 46) that the "affiliation guidelines" promulgated in 2010 "obviate any constitutional difficulty" in the Policy Requirement. That argument also fails.[12]

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[12] Respondents' argument before this Court is not that the 2010 Guidelines are unconstitutional, but rather that they fail to remedy the constitutional injuries inflicted by the Policy Requirement. Although respondents did challenge the Guidelines themselves below, the lower courts did not reach those arguments.

A. The Possibility That An Affiliate May Remain Silent Or Express Another View Does Not Cure The Policy Requirement's Unconstitutional Compulsion Of Speech

This Court has upheld funding conditions restricting speech when the recipient could engage in the restricted expression through an alternative channel. *See Rust*, 500 U.S. at 198-199; *Regan*, 461 U.S. at 544; *see also Velazquez*, 531 U.S. at 546-547 (invalidating condition where "there [wa]s no alternative channel for expression of the advocacy Congress s[ought] to restrict"); *League of Women Voters*, 468 U.S. at 400 (condition banning all editorializing was unconstitutional, but hypothetical statute allowing a recipient to "use [its] facilities to editorialize with nonfederal funds" would have been valid). The availability of an alternative channel for expression provides no remedy, however, when the funding condition not only restricts speech, but also compels the recipient to adopt and express a view it does not hold or wishes not to express. As the court of appeals explained, "[t]he curative function of an 'adequate alternative channel' is to alleviate the burden of a constraint on speech by providing an *outlet* that allows an organization to engage—through the use of an affiliate—in the privately funded expression that otherwise would have been impermissibly prohibited." Pet. App. 35a. "It simply does not make sense" to conceive of the affiliate guidelines as "affording an outlet to engage in privately funded *silence*" or "an outlet to do nothing at all." Pet. App. 36a.

Accordingly, when a person is compelled to speak, it is no answer that he or she may retain an agent to remain silent. Citing *Rust*, the government contends (at 47) that this reasoning "misunderstands the First Amendment value of affiliate structures." But *Rust* did

not involve an affirmative compulsion of speech. It involved a restriction on speech that could be ameliorated by permitting the recipient to engage in the restricted speech through an affiliate. Here, by contrast, if a Leadership Act recipient is compelled to adopt and express a policy opposing prostitution, the existence of an affiliate cannot alter or retract the recipient's compelled statement. Nor is it an answer that the agent can express a contrary view, for that also does nothing to undo the speech that has been compelled.[13]

B. The Possibility That An Affiliate May Engage In Speech "Inconsistent" With An Opposition To Prostitution Does Not Cure The Policy Requirement's Organization-Wide, Viewpoint-Based Restriction Of Speech

The affiliate guidelines are inadequate to cure the Policy Requirement's violation of the First Amendment for the additional reason that recipients of Leadership Act funds remain subject to an entity-wide, viewpoint-based restriction on their private speech. In upholding the funding condition in *Rust*, the Court distinguished between the "Title X *grantee*" and the "Title X *project*," emphasizing that the grantee remained free to speak its views through "programs that [we]re separate and independent from the project that receives Ti-

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[13] *Riley* does not support the government's assertion (at 33) that there is no meaningful distinction between compelled speech and compelled silence. *See supra* p. 28. As explained, that distinction is highly relevant to the question whether the 2010 Guidelines can save the Policy Requirement. Compelled silence can be alleviated by providing an alternative channel for speech; compelled speech cannot be alleviated by creating an alternative outlet for silence.

tle X funds." 500 U.S. at 196. This structure left the grantee as an organization "unfettered in its other activities." *Id.* In contrast, the Policy Requirement imposes an entity-wide restriction on a recipient's speech, including its private speech undertaken outside the context of any Leadership Act project. Although the 2010 Guidelines permit a separate affiliate to engage in speech the government deems "inconsistent" with an opposition to prostitution, the recipient of federal funding itself still may not do so, even when engaging in privately funded speech.

Moreover, to satisfy the 2010 Guidelines, an affiliate must remain so separate from the Leadership Act grantee as to prevent any meaningful control of the affiliate's speech by the grantee. "It hardly answers one person's objection to a restriction on his speech that another person, *outside his control*, may speak for him." *Regan*, 461 U.S. at 553 (Blackmun, J., concurring) (emphasis added); *see also Citizens United* v. *FEC*, 130 S. Ct. 876, 897 (2010) (because "[a] PAC is a separate association from the corporation," the PAC's exemption from the corporate expenditure ban "d[id] not allow corporations to speak," and "the option to form PACs d[id] not alleviate the First Amendment problems with" the expenditure ban). This Court accordingly recognized in *League of Women Voters* that, for an affiliate regime to be adequate, the grantee must be "free[] to make known *its* views on matters of public importance through its nonfederally funded, editorializing affiliate." 468 U.S. at 400 (emphasis added); *see id.* (noting that in *Regan*, the charitable organization could conduct "*its* lobbying efforts" through a separate affiliate (emphasis added)).

In *Rust*, the alternative channel was adequate because the grantee could control the content of speech

within its privately funded programs. All that was required there was separation within a single organization between publicly funded and privately funded activities or programs. Here, by contrast, the Policy Requirement by its terms applies to the entire "group or organization," and any affiliate therefore cannot be part of the same organization. The 2010 Guidelines accordingly indicate that an affiliate should be a "legally separate entity" and have separate facilities and "separate personnel"—the latter of which the government has interpreted to include "low-level employees, mid-level managers, and high-level corporate officials." Appellant C.A. Br. 49 (Jan. 15, 2009).[14] These restrictions hinder the ability of a grantee to convey *its* message through an affiliate or to have any control over the content of the affiliate's speech. Indeed, USAID has already investigated CARE, one of respondent InterAction's members, for entering into privately funded partnerships with foreign organizations deemed insufficiently opposed to prostitution. *See* JA151-152. Were a grantee to direct its own affiliate to express views deemed inconsistent with an opposition to prostitution—for example, by publishing a paper discussing whether the criminalization of prostitution contributes to the spread of HIV/AIDS—the grantee might similarly be accused of violating the Policy Requirement. Under these circumstances, permitting the affiliate to

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[14] Although the Guidelines provide that the presence or absence of these factors will not be determinative, sharing facilities or personnel—as would be required for the Leadership Act grantee to have any control over the speech expressed by the affiliate—would weigh against a finding that the affiliate satisfies the Guidelines. Pet. App. 298a, 309a-310a.

express its views does not provide an alternative channel for the recipient's own communication.

The government argues (at 48-49) that respondents could "cabin" the effects of the Policy Requirement by creating affiliates with the limited purpose of receiving and spending Leadership Act funds and complying with the Policy Requirement. The government surmises that, by establishing such special-purpose affiliates, respondents themselves would not be subject to the Policy Requirement and would therefore suffer no First Amendment violation. That is incorrect. As an initial matter, the government's eligibility criteria all but foreclose this route. Regulations require organizations like respondents that seek Leadership Act funds through USAID to demonstrate "technical merits," "cost effectiveness," and "past performance," and to have been in existence for 18 months and receive at least 20 percent of their funding from sources other than the U.S. government. *See supra* pp. 7-8 & n.1. A newly created affiliate could not satisfy these requirements, and even if it could, such an entity with no experience, expertise, or track record (and a brand new staff) would find it difficult if not impossible to compete effectively for Leadership Act funding, much less effectively operate the government program.

Apart from these obstacles, the government's proposed "special-purpose affiliate" regime would not solve the constitutional problem. First, whether the funding recipients are respondents themselves or their newly formed affiliates, the recipients would still be compelled to adopt and express the government's viewpoint on an organization-wide basis and refrain from any speech inconsistent with that viewpoint, even with their private funds. The constitutional violation would merely be shifted to a new organization, not

cured. *See* Pet. App. 35a. Second, even under the government's "special-purpose affiliate" proposal, respondents' own speech would still be penalized. By declining to espouse the government's anti-prostitution policy themselves, respondents would lose the opportunity to receive Leadership Act funds. The possibility that their separate affiliates might receive those funds does not remedy the fact that respondents would have been denied a benefit based on their protected speech.

Finally, the government notes (at 45-46) that the affiliate regime upheld in *Regan* and the hypothetical regime discussed with approval in *League of Women Voters* each recognized speech by a separate entity as an adequate alternative channel. Neither of those cases, however, involved a viewpoint-based restriction that precluded the funding recipient from expressing a particular opinion through any medium. Although the 501(c)(3) organization in *Regan* could not engage in lobbying, it remained free to communicate its preferred point of view through any medium other than lobbying. The Court explained, however, that "[t]he case would be different" if "the statute w[ere] intended to suppress any ideas or ... had that effect." 461 U.S. at 548. Similarly, under the regime hypothesized in *League of Women Voters*, publicly funded broadcast-television stations would have to channel on-air editorializing through an affiliate, *see* 468 U.S. at 400-401, but they could express any view through "any medium other than subsidized public broadcasting," *id.* at 408 (Rehnquist, J., dissenting); *see also Velazquez*, 531 U.S. at 549 (alternative channel cannot cure First Amendment violation when the funding condition is "aimed at the suppression of ideas thought inimical to the Government's own interest"). Here, the Policy Requirement prohibits the recipient of Leadership Act funds

from expressing a particular viewpoint through any medium, using any funds. The affiliate regime under the 2010 Guidelines cannot compensate for the severity of this restriction.

C. The Affiliate Guidelines Are Too Burdensome And Vague To Provide An Adequate Alternative Channel For Protected Speech

In cases where this Court has upheld a funding restriction on speech by relying on the grantee's freedom to speak through an affiliate, the Court has emphasized the ease with which that alternative channel could be invoked. In *Regan*, the organization could continue to lobby if it simply "return[ed] to the dual structure it used in the past" by maintaining a "separately incorporated" affiliate and "keep[ing] records adequate to show that tax deductible contributions are not used to pay for lobbying." 461 U.S. at 544 & n.6. The Court found that those rules were not "unduly burdensome." *Id.* at 544 n.6. In *Rust*, the federally funded entity could engage in abortion advocacy through "programs that are separate and independent from the project that receives Title X funds" without establishing a separate affiliate. 500 U.S. at 196; *see also League of Women Voters*, 468 U.S. at 400 (permissible affiliate regime would allow station to use its own facilities to editorialize).

Here, by contrast, the 2010 Guidelines impose burdens that are so severe as to be practically prohibitive. These burdens begin with the task of establishing new, separate legal entities in foreign countries.[15] Although

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[15] The Guidelines purport to make "legal separation" only one of five non-exclusive factors to be considered in evaluating compli-

creating and incorporating a new entity in the United States may not be unduly burdensome (though it is expensive and time-consuming), many of the foreign countries in which respondents operate have imposed significant barriers to entry by foreign NGOs. Establishing or introducing a new affiliate in these countries bears little resemblance to the process of, say, setting up a new 501(c)(4) arm for a nonprofit in the United States. *Cf. Regan*, 461 U.S. at 544 n.6. Most of the countries in which respondents operate require foreign NGOs to register with the government—a process that typically "entails hiring local attorneys, paying registration fees, filling out forms, hiring consultants, traveling to the country, ... waiting for months before starting programs," and engaging in "complex negotiations with multiple ministries." JA129, 141. In India, for example, establishing a new affiliate would require clearance from the Indian Intelligence Bureau, the Ministry of Foreign Affairs, and other government authorities. JA201. Respondents and their members have experienced extensive delays and outright denials in their attempts to obtain registrations in foreign countries. JA106. In Bangladesh, for example, establishing an affiliate "takes months or years of application and seeking government approval, including consideration of the activities that the organization will carry out, examination of the proposed board, and other procedures." JA207. And in Mozambique, the U.S. Department of State found that registering foreign NGOs "involved

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ance with the separation requirement. *See* Pet. App. 298a, 309a-310a. The government, however, has not explained how a grantee could operate a Guidelines-compliant affiliate without legal separation, given that the Policy Requirement applies organization-wide. *See supra* p. 9.

significant discretion on the part of government officials" and regularly took months. JA211.

Under the 2010 Guidelines, respondents would have to complete that process in multiple countries, each with differing legal regimes and requirements. For example, if an NGO accepts a Leadership Act grant to fund a new HIV/AIDS program in Angola, all of its programs worldwide would become subject to the Policy Requirement. If that NGO wished to free its activities outside Angola from the restrictions of the Policy Requirement, it would have to set up new affiliates in every country in which it operates and transfer all of its existing operations in those countries to the new affiliates. *See* JA106, 141, 157. That task could not be completed without the assent of every country in which the NGO operates, and that assent would not always be forthcoming. The idea of the same NGO operating through two separate entities in the same country could elicit suspicion from local authorities, who may believe the affiliates will be used for unlawful purposes, such as to "evade tax or customs requirements, or to engage in advocacy or political activities." JA109, 198, 203, 213. Such authorities are unlikely to view an administrative regulation promulgated by a U.S. agency as a compelling reason to permit a new and duplicative foreign entity to operate within their borders. And if, say, the Tanzanian government refused to permit the NGO that receives Leadership Act funds in Angola to establish a new affiliate in Tanzania, the NGO would be forced to choose between acceding to the Policy Requirement's restrictions in Tanzania, without any alternative channel for protected speech, or terminating its Tanzanian operations altogether.

Even assuming grantees could establish new affiliates in all of the relevant countries, further difficulties

abound. The 2010 Guidelines indicate that affiliates should have "separate personnel." Pet. App. 298a. But recruiting, hiring, and supervising duplicate staff would be prohibitively costly, wasteful, time-consuming, and difficult. JA176-177. Most organizations typically have a single country representative and senior staff to lead the organization's programs in a given country; the Guidelines would require two. JA180. And finding new staff for new field offices would be a significant challenge: Many countries limit the number of foreign staff that NGOs may employ and impose onerous work-permit and visa requirements on foreign NGO employees. JA209. Often, as in Mozambique, the NGO must demonstrate that no local applicant has the necessary qualifications. JA212-213. This process can take months. An International Red Cross study found that 77 percent of humanitarian NGOs reported significant difficulties obtaining work permits and visas. JA196; *see also* JA181.

The 2010 Guidelines also indicate that affiliates should maintain separate facilities. Pet. App. 298a. Doing so would require organizations to obtain new office space and import duplicative equipment, including computers, servers, and generators, at great cost. *See* JA186-188. Even opening separate bank accounts can be difficult. In India, for example, foreign NGOs are allowed only a single bank account that receives funds from abroad. Even minor changes require government permission; for instance, it can take up to a year to add a single local employee as a signatory to an existing account. JA185.

Moreover, even assuming an NGO could establish a working affiliate that would not be subject to the Policy Requirement, that affiliate would lack the track record and credibility to compete effectively for projects and

non-Leadership Act funding. *See* JA106-107, 141, 158, 172-174. This problem is exacerbated by the Guidelines' requirement that the affiliate must maintain separate identification from the grantee, Pet. App. 298a, which prevents the affiliate from relying on the reputation and brand the main organization has established through its work. Moreover, the cost of complying with the Guidelines will increase the organization's overhead and decrease the amount of funds available for actual work in fighting HIV/AIDS. Higher administrative costs in turn deter private donors and harm fundraising. *See* JA177-178, 199-200. None of the affiliate regimes this Court has previously addressed required organizations to overcome such onerous barriers to engage in protected expression. *See supra* p. 52.[16]

Apart from these practical burdens, the affiliate guidelines are too vague to provide an adequate alternative channel for protected speech. Respondents do not now ask this Court to invalidate the 2010 Guidelines as unconstitutionally vague, although they are.[17] Rather, the point is that grantees can never be sure whether they are sufficiently "separate" from any activities of an affiliate that the government would deem "inconsistent" with a policy opposing prostitution to

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[16] In *DKT*, which was decided before any affiliate guidelines were promulgated, the D.C. Circuit relied on the government's representation that nothing in the final regulations would prevent a subsidiary from qualifying for Leadership Act funding, leaving a parent organization free to avoid the Policy Requirement. *See* 477 F.3d at 763 & n.4. As shown, the reality of the Guidelines is far different from what the *DKT* court assumed.

[17] Respondents raised this point in the lower courts and reserve the right to press it in the event of a remand.

avoid being penalized for their affiliate's speech. *See, e.g.*, JA127-128. Grantees will accordingly be forced to comply with the most demanding interpretation of the affiliation requirements to avoid losing federal funding.

For example, the 2010 Guidelines provide that a grantee will be deemed to have "objective integrity and independence" from an affiliate if it is, "to the extent practicable in the circumstances, separate from the affiliated organization." Pet. App. 297a-298a. Whether sufficient separation exists, in turn, is to be determined by the government "on a case-by-case basis," "based on the totality of the facts." Pet. App. 298a. No single factor or set of factors is to be "determinative"; indeed, no single set of factors exists. Pet. App. 298a. Although the Guidelines include a list of factors to be considered, the government's assessment of grantees' compliance "shall ... not be limited to" those five factors. Pet. App. 298a. Accordingly, no grantee can determine with any certainty that an affiliate will be found sufficiently "separate" to comply with the Guidelines. Grantees are thus forced "to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked" and to "restrict[] their conduct to that which is unquestionably safe." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (citation omitted).[18]

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[18] That concern is amplified by the penalties the government may impose if it deems grantees in violation of the Policy Requirement. For example, USAID may punish violations of the Policy Requirement by terminating an award, seeking a refund of money already disbursed, or debarring the grantee from receiving USAID grants. *See* 22 C.F.R. §§ 226.62(a)(3), 226.73; 2 C.F.R. §§ 780.10, 780.20, 180.800.

The 2010 Guidelines thus require grantees to undertake the difficult and possibly futile endeavor of trying to create affiliates in a host of foreign countries, with no assurance that those affiliates will be free to engage in speech "inconsistent" with the government's viewpoint. In light of these burdens, the affiliate regime fails to provide an adequate alternative channel for the constitutionally protected speech that the Policy Requirement forbids.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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No. 12-10

In the Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,
PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY
INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

At bottom, respondents' view of the First Amendment boils down to this: the government may limit the ways in which recipients use federal funds, but it may do nothing more to ensure that those recipients will not undermine the goals of federal programs. Congress may not provide funds for racial justice in South Africa only to entities that oppose apartheid; it may not provide funds for social justice in Afghanistan only to entities that oppose the Taliban's oppression of women; and it may not provide funds for HIV/AIDS prevention in developing countries only to entities that oppose prostitution and sex trafficking. The government alone—unlike any private speaker or donor—may not condition the receipt of its funds on the recipient's willingness to further, or at least to abstain from undermining, the goals

of the very funding program at issue. That is not, and should not be, the law.

A. Congress Has Wide Latitude To Attach Conditions To The Receipt Of Federal Funds In Order To Further The Policy Objectives Of Federal Programs

Before the lower courts and before this Court at the certiorari stage, respondents largely treated the funding condition in 22 U.S.C. 7631(f) as if it were a direct regulation compelling their speech. See Resp. C.A. Br. 30-37; Br. in Opp. 18-21. The court of appeals effectively adopted that rationale. See Pet. Br. 33-36; Pet. App. 25a-29a. Now at the merits stage, respondents advance what amounts to the same argument, but dressed up in different language. Respondents acknowledge that Section 7631(f) is a condition on the receipt of federal funds, but they say that the condition is permissible only if it could be enacted as a direct regulation. Respondents thus contend (Br. 16, 20-25) that the Spending Clause provides Congress with no additional latitude when it comes to funding conditions: Congress may not place any condition on federal benefits that it could not enact as a direct regulation of speech or conduct. That contention is flatly inconsistent with this Court's Spending Clause jurisprudence.[1]

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[1] As respondents note (Br. 13), the Office of Legal Counsel (OLC) initially opined in a one-page memorandum that Section 7631(f) could not be applied to "U.S. organizations." App., *infra*, 2a. OLC did not offer any reasoning for that conclusion. OLC also noted that, because of "the limited time available," it had not been able to conduct "a comprehensive analysis" and therefore its views were "tentative" and "might need to be altered after further analysis." *Id.* at 1a-2a. After more extensive analysis, OLC concluded that Section 7631(f) may be applied to domestic organizations.

1. This Court has repeatedly declared that "the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." *South Dakota* v. *Dole*, 483 U.S. 203, 209 (1987); see *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S.Ct. 2566, 2579 (2012); *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998). The Court thus has explicitly rejected respondents' argument that a funding condition is permissible only if it could be enacted as a direct regulation. See, *e.g.*, *ibid.*; *United States* v. *American Library Ass'n, Inc.*, 539 U.S. 194, 203 n.2 (2003) (plurality opinion). The reason for the constitutional distinction is straightforward: entities that do not wish to comply with funding conditions may avoid them by declining to apply for and accept the funds. See Pet. Br. 17-18.

a. Respondents relegate *Dole* and its progeny to a footnote, where they say that *Dole* "simply recognized that Congress may use the spending power to achieve objectives that lie beyond its enumerated legislative powers." Br. 22 n.3. *Dole* recognized more than that. This Court squarely held in *Dole* that Congress may achieve objectives under the Spending Clause that it may not command directly. Here, Congress could no more directly instruct respondents to adopt a policy concerning prostitution and sex trafficking than it could instruct South Dakota in *Dole* to establish a particular drinking age. But here, no less than in *Dole*, Congress may condition federal funding on respondents' willingness to have such a policy in their provision of HIV/AIDS-related services.

To be sure, this Court in *Dole* explained that a funding condition may not induce the recipient to take an action that would itself be unconstitutional. See 483 U.S.

at 210-211. Nor may a funding condition "be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But neither of those limitations is relevant here. If respondents elect to accept Leadership Act funds and represent to the granting agencies that they oppose prostitution and sex trafficking, that conduct by respondents, as private actors, does not violate the First Amendment. And respondents have not asserted that they are compelled to take Leadership Act funds. Many of respondents provided public health services decades before the passage of the Leadership Act in 2003, see, *e.g.*, Resp. Br. 4-6, and since that time all respondents have had a voluntary choice whether to apply for funding under the Act.

b. Respondents likewise have no answer for this Court's decision in *Finley*. They quote (Br. 22 n.3) a portion of the relevant passage, but it bears repeating in full: "[A]lthough the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." 524 U.S. at 587-588. The Court in *Finley* thus rejected respondents' central argument that Congress may not distinguish among funding recipients according to criteria (like having a policy opposing prostitution and sex trafficking) that would be impermissible as a direct speech regulation. The *Finley* Court observed, however, that "if a subsidy were manipulated to have a coercive effect, then relief could be appropriate." *Id.* at 587 (internal quotation marks omitted). Again, respondents have no colorable claim that Section 7631(f) amounts to a coercive penalty on contrary viewpoints.

Respondents argue that this case differs from *Finley* because the policy condition is not a "selection criterion," *i.e.*, the government does not use the policy condition to select "organizations that have standing policies opposing prostitution." Br. 25 n.4. But that cannot be a relevant distinction. If the government awarded funds only to organizations with preexisting policies opposing prostitution and sex trafficking, that would amount to exactly the same thing in practice. Either way, the policy condition in Section 7631(f) would serve as a "selection criterion," whether the government verifies, or the recipient vouches for, the existence of an anti-prostitution policy. In the end, respondents' argument really is that Congress cannot adopt the policy condition as a prophylactic measure to prevent them from undermining Leadership Act programs in their privately funded operations.

2. Respondents' proposed test—that a funding condition is permissible only if it could be imposed as a direct regulation—obviously is at odds with *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Respondents do not argue that Congress could have commanded doctors and public health providers to counsel patients only about certain methods of family planning. Yet this Court held in *Rust* that Congress was entitled under the Spending Clause to "selectively fund a program to encourage certain activities it believes to be in the public interest" and "insist[] that public funds be spent for the purposes for which they were authorized." *Id.* at 193, 196. Respondents assert that the restrictions at issue in *Rust* were limited to ensuring that federal funds alone were "properly applied to the prescribed use." Br. 23 (quoting *Rust*, 500 U.S. at 195 n.4). That assertion cannot be squared with the facts of *Rust* or this Court's opinion.

In *Rust*, the restrictions applied to programs receiving federal funds under Title X of the Public Health Service Act, 42 U.S.C. 300 *et seq.* See 500 U.S. at 178. Most Title X grantees "receive[d] funds from a multitude of other governmental and private sources," Pet. Br. at 27, *Rust*, *supra* (No. 89-1391), and indeed Title X required recipients to contribute matching nonfederal funds to Title X programs, see 500 U.S. at 199 n.5. The challengers in *Rust* argued that because their Title X programs also received substantial nonfederal funds, they had a First Amendment right to engage in abortion-related counseling with those nonfederal funds. See Pet. Br. at 24-28, *Rust*, *supra* (No. 89-1391). The Court squarely rejected that argument. See *Rust*, 500 U.S. at 199 n.5. The Court reasoned that "Title X subsidies are just that, subsidies," and "[b]y accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any [nonfederal] funds." *Ibid.* Contrary to respondents' assertion (Br. 23), this Court in *Rust* upheld a restriction on the use of both federal and nonfederal funds, and it should do so again here for the same reasons.

That leaves respondents with only one way to distinguish *Rust*: the funding condition here is different, they say, because the condition is on "the *recipient* of the subsidy rather than on a particular program or service." Br. 24 (quoting *Rust*, 500 U.S. at 197). But the Court in *Rust* understood that even the "particular program" operated with both federal and nonfederal funds. See 500 U.S. at 199 n.5. Moreover, the Court's point in *Rust* was that when a condition applies on an entity-wide basis, *and the government does not allow an alternative means of expression*, then the recipient may be effectively prevented from engaging in the restricted expres-

sion altogether. See *id.* at 197-198. The Court therefore pointed to its decisions in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), and *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), as approving the use of affiliate structures to alleviate the burden placed on privately funded expression by a federal funding condition. See *Rust*, 500 U.S. at 197-198.

Again, that reasoning applies equally here. There is no difference between choosing to establish two affiliated broadcast stations (one that uses federal funds and one that does not), see *League of Women Voters*, 468 U.S. at 400; two affiliated charitable organizations, see *Regan*, 461 U.S. at 544-546; or two affiliated public health organizations. This case is thus indistinguishable from *League of Women Voters* and *Regan*, where the required separation necessarily would have been at an organizational rather than a programmatic level. Because respondents may "establish 'affiliate' organizations" that do not have policies opposing prostitution and sex trafficking—and that therefore may espouse contrary views on those subjects with "nonfederal funds"—the regulatory scheme here is "plainly * * * valid." *League of Women Voters*, 468 U.S. at 400.

3. Respondents rely (Br. 22, 24) on the fact that this Court invalidated federal funding conditions under the First Amendment in *Legal Services Corporation* v. *Velazquez*, 531 U.S. 533 (2001), and *League of Women Voters*. But in both of those cases, the government was funding and facilitating private speech rather than promoting its own program and policy through private actors. See *Velazquez*, 531 U.S. at 542, 548; *League of Women Voters*, 468 U.S. at 378-380, 386-387, 395. The Court further determined that the funding conditions in those cases attempted "to suppress speech inherent in

the nature of the medium." *Velazquez*, 531 U.S. at 543; see *id.* at 544-545 (restricting lawyers from advancing certain arguments as a condition of funding "distorts the legal system" and "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"); *League of Women Voters*, 468 U.S. at 396-399.

Velazquez thus stands for the proposition that a federal funding condition, even if it does not cross the line between inducement and coercion, may not fundamentally distort the medium for private expression at issue in a way that severely impairs an important public function. Here, however, respondents do not argue that the ability to favor, advocate for, or remain neutral toward prostitution and sex trafficking is inherent to providing HIV/AIDS-related services in foreign countries. To be sure, respondents believe that if they adopt policies opposing prostitution, "[their] work with this critical population could be compromised." Br. 12. That concern is without merit, however, because as respondents acknowledge (Br. 35), Section 7631(f) requires a recipient to affirmatively convey its policy opposing prostitution only to the funding agency, not to any sex workers to whom it provides services. See Pet. Br. 22, 27.

But even if respondents are right that the policy condition might render them less effective in their work with prostitutes via federal programs, that is a far cry from demonstrating that Section 7631(f) "distorts the [public health] system by altering [respondents'] traditional role" or "aim[s] at the suppression of ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S. at 544, 549. Rather, Section 7631(f) is addressed to entities that receive substantial federal funds and that are publicly associated with the United

States in implementing the federal government's programs and policies abroad. See 22 U.S.C. 7611(h) (Supp. V 2011) (requiring that the Global AIDS Coordinator "develop a message, to be prominently displayed by each program receiving funds under this chapter" that "the program is a commitment by citizens of the United States to the global fight against HIV/AIDS" and "is an effort on behalf of the citizens of the United States").

Moreover, in both *Velazquez* and *League of Women Voters*, this Court relied on the absence of any alternative channel for the restricted expression. See *Velazquez*, 531 U.S. at 546-547 ("[W]ith respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to *Rust*."); *League of Women Voters*, 468 U.S. at 400. That is not the case here, because the agencies' affiliation guidelines allow Leadership Act funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f).

4. Respondents also rely (Br. 20, 25) on this Court's statement in *Speiser* v. *Randall*, 357 U.S. 513 (1958), that the government may not use the denial of benefits to "produce a result which [it] could not command directly." *Id.* at 526; see *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (quoting *Speiser*). But in *Speiser*, the state property tax exemption at issue—which required veterans to swear an oath not to advocate overthrow of the federal or state government—had "the effect of coercing the claimants to refrain from the proscribed speech." 357 U.S. at 519. The *Speiser* exemption thus "frankly aimed at the suppression of dangerous ideas." *Ibid.* (quoting *American Commc'ns Ass'n* v. *Douds*,

339 U.S. 382, 402 (1950)). Similarly in *Perry*, a state college professor alleged that his employment contract had not been renewed "based on his public criticism of the policies of the college administration." 408 U.S. at 595; see *id.* at 598.

Section 7631(f) is nothing like the restrictions at issue in *Speiser* and *Perry*; it does not require respondents to swear a loyalty oath to, or retaliate against them for public criticism of, the government. Section 7631(f) simply requires respondents, as a condition of receiving federal monies, to support a policy that Congress adopted as its own in the Leadership Act and that Congress is funding respondents in part to further in their overseas operations. See Part C, *infra*; 22 U.S.C. 7601(23) (finding that "it should be the policy of the United States to eradicate" prostitution, sex trafficking, and sexual violence). Accordingly, this Court's Spending Clause jurisprudence makes clear that Section 7631(f) is permissible, because it does nothing more than induce respondents to oppose prostitution and sex trafficking when they receive funds to carry out a federal program. It does not coerce respondents to accept those funds; it does not fundamentally distort respondents' expression related to their provision of HIV/AIDS services; and it does not aim at the suppression of dangerous ideas.

B. Section 7631(f) Is A Noncoercive Funding Condition, Not A Direct Speech Regulation

Because respondents apply the wrong test, they reach the wrong result. Respondents argue (Br. 26-34) that if Section 7631(f) were enacted as a direct regulation of speech, then it would impermissibly compel speech and discriminate on the basis of viewpoint. That counterfactual approach allows respondents to ignore the basic difference between a noncoercive funding con-

dition enacted pursuant to Congress's spending power and a coercive direct speech regulation enacted pursuant to some other power.

1. The court of appeals reasoned that the Act's funding condition is impermissible because it compels recipients to speak rather than remain silent with respect to prostitution and sex trafficking. See Pet. App. 25a. That distinction between compelled speech and compelled silence should not be determinative here, see Pet. Br. 33-36, and respondents no longer defend it. Rather, respondents say (Br. 27) simply that if Section 7631(f) were a direct regulation of speech, it would compel speech and thus be unconstitutional. They analogize the funding condition to laws requiring fundraisers to provide certain disclosures, see *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-796 (1988); employees to contribute fees to unions for political activity, see *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-235 (1977); motorists to display a state motto on their license plates, see *Wooley* v. *Maynard*, 430 U.S. 705, 707, 717 (1977); or schoolchildren to recite the Pledge of Allegiance and salute the flag, see *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

Unlike those types of direct regulation, Section 7631(f) does not require individuals to express or fund particular views as a condition of employment or access to a generally available public benefit. As the District of Columbia Circuit has explained, "[o]ffering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education or access to public roads." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762 n.2 (2007) (*DKT*)

(internal citations omitted). Or as this Court has put it in a similar context, conditioning the availability of federal HIV/AIDS assistance on adhering to that program's policy opposing prostitution and sex trafficking "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

2. Respondents also claim that the policy condition "suppresses speech expressing a disfavored point of view." Br. 30. But respondents do not mean by "suppress[ion]" what this Court's subsidy cases mean. The Court's test in those cases is whether the denial of the subsidy threatens "to drive certain ideas or viewpoints from the marketplace." *Finley*, 524 U.S. at 587 (internal quotation marks omitted). Respondents have never made *that* type of claim. Even before this Court, respondents say not a word about why it is practically impossible for them to decline Leadership Act funds—or why even if all of respondents are coerced to accept the funding, that would unduly skew the foreign marketplaces of ideas in the countries where respondents operate. When respondents say that Section 7631(f) "suppresses" their speech, what they appear to mean is that the Leadership Act offers them an *incentive* to participate in the federal program and thus to accept the condition imposed by Section 7631(f). On respondents' view, every subsidy carrot is a suppression stick—and thus Congress may never offer subsidies that promote a particular viewpoint.

Respondents also appear to mean (Br. 30-33) by "suppression" that Section 7631(f) discriminates on the

basis of viewpoint. That is the only claim respondents made to the lower courts. See, *e.g.*, Resp. C.A. Br. 17-18, 31-36. But respondents do not point to any case in which this Court has invalidated a federal funding condition on the ground that it discriminates on the basis of viewpoint. That is because "[w]hen it communicates its message, * * * the government can—and often must—discriminate on the basis of viewpoint." *DKT*, 477 F.3d at 761. This Court has therefore held that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). The question then is whether in the Leadership Act Congress has "appropriate[d] public funds to promote a particular policy of its own." *Ibid.* As explained below and at length in our opening brief (at 19-33), it has.

C. Section 7631(f) Ensures That The Leadership Act's Policy Opposing Prostitution And Sex Trafficking Is Effectively Implemented By Funding Recipients

1. The policy condition ensures that recipients do not undermine the Act's policy opposing prostitution and sex trafficking

a. Respondents suggest (Br. 39, 41-42) that it is not clear what Section 7631(f) is meant to accomplish. Most obviously, the policy condition ensures that respondents do not advocate or promote the legalization of prostitution or sex trafficking with nonfederal funds. Section 7631(f) thus complements the parallel restriction on federal funds in Section 7631(e). For instance, suppose that an employee of respondent Pathfinder International, in the course of administering one of its federally funded programs, is asked by a reporter or a sex worker

about the organization's position on the legalization of prostitution. Assuming that the employee is being paid at that moment with federal funds, he cannot "promote or advocate" the legalization of prostitution under Section 7631(e). On respondents' view, however, the same employee could appear at a debate or on a television show minutes later—and so long as he were ostensibly being paid for that time with nonfederal funds—he could advocate for the legalization of prostitution.

It is hard to imagine a system that would more "garble[]" or "distort[]" Congress's opposition to prostitution. *Rosenberger*, 515 U.S. at 833. Like Penelope nightly unraveling Laertes's shroud, respondents' privately funded operations could spend their time undoing the prostitution-related aspect of their federally funded operations. According to respondents, they have a constitutional right to apply for and accept billions of dollars for the treatment and prevention of HIV/AIDS—under a program that has a policy calling for the reduction of prostitution and sex trafficking—and yet to undermine Congress's efforts to eliminate those practices. The Court has never recognized such a right, and indeed it explicitly rejected any such right in *Rust*. There simply is no First Amendment right to use federal monies to speak out of both sides of one's mouth: to convey one viewpoint with federal funds and to convey a contrary viewpoint with nonfederal funds.

b. The policy condition also ensures that respondents do not undermine Congress's opposition to prostitution, sex trafficking, and sexual violence in their many different interactions with commercial sex workers and others linked to the sex trade. Only some Leadership Act programs directly involve "educating men and boys about the risks of procuring sex commercially and about the

need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; or "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (Supp. V 2011). Congress therefore has determined that it would not make sense to require all recipients to affirmatively and actively disseminate its message opposing prostitution and sex trafficking. See Pet. Br. 27 & 43 n.6.

Many respondents, however, have the potential through their provision of foreign HIV/AIDS services to come into contact with numerous foreign officials and individuals, including commercial sex workers and others related to the sex trade. Those countless interactions are typically impossible to anticipate in advance. And because the interactions occur overseas and often in distant locales, they are exceedingly difficult, if not impossible, for the government to supervise or monitor in any cost-effective way. Section 7631(f) ensures that in those myriad, foreign interactions, respondents act consistently with opposition to—rather than support for or indifference toward—prostitution and sex trafficking. See 22 U.S.C. 7601(23) ("[I]t should be the policy of the United States to *eradicate* such practices.") (emphasis added). Congress reasonably concluded that if, like the United States, recipients have a policy opposing prostitution and sex trafficking, they are far more likely to act in accordance with that policy.

Respondents focus (Br. 35, 39) on the fact that their particular programs do not aim specifically at reducing the commercial sex trade. On their approach, that fact should be irrelevant; respondents do not believe that Section 7631(f) may limit any recipient's privately fund-

ed operations, no matter what kind of programs the recipient operates. Regardless, respondents assert (Br. 32-33) the right to publicly counter the government's policy on prostitution and sex trafficking, and they do not deny (Br. 11-12) that many of their programs can bring them into contact with workers in the commercial sex trade. Thus, in ways both large and small, respondents seek the right to undermine the very program under which they apply for and accept federal funds. No private speaker or donor would dream of partnering with entities that did not share its goals and objectives. Yet respondents claim a constitutional right to that type of adversarial relationship.

Respondents and their amici contend that upholding Section 7631(f) would vest the government with unbounded authority to regulate private speech. See, *e.g.*, Resp. Br. 39; Becket Fund Amicus Br. 4. This Court, however, has not taken an extreme, all-or-nothing approach in this area. Rather, it has struck a careful balance by recognizing that the government has broad, but by no means unlimited, authority with respect to funding conditions. Among those limits, the government may not leverage funding or other benefits to suppress a viewpoint that the government deems subversive or dangerous. See *Speiser*, 357 U.S. at 519; *Perry*, 408 U.S. at 597-598. Again, even respondents have not claimed *that* is what Section 7631(f) does. The policy condition is hardly an effort to crack down on subversive speech. The subject of the funding condition—opposition to prostitution and sex trafficking—is not only germane to the goals of the funding program, see *Dole*, 483 U.S. at 208, but integrally related to Congress's objectives in the Leadership Act. Moreover, that funding flows to foreign countries where respondents' interactions with

foreign officials, organizations, and individuals are exceedingly difficult to oversee.

In addition, as respondents recognize, those foreign nations have adopted different stances to prostitution, from "highly tolerant to harshly punitive." Br. 12. Congress has occupied a middle ground: discouraging the practice but supporting HIV/AIDS treatment and care for those who engage in it. That is the foreign policy Congress has determined should be furthered in other nations with divergent views. The First Amendment does not prevent Congress, when it funds a program abroad, from placing reasonable limits on the expression of recipients in that foreign marketplace. When agencies like HHS and USAID themselves conduct the Leadership Act programs at issue, they are required to conduct the programs in the manner that Congress intended. The same result should obtain when Congress engages private partners to perform work in the agencies' stead—and when it clearly communicates in advance precisely how it wants those private partners to perform. In those circumstances, Section 7631(f) is a reasonable effort to ensure that recipients do not distort or undermine Congress's policy opposing prostitution and sex trafficking.

c. To be sure, those features mean that this case involves a less direct kind of government speech. Congress could have funded respondents to speak directly to commercial sex workers and others about the risks of prostitution and sex trafficking. Respondents acknowledge (Br. 40-41) that type of government speech would be permissible. Instead, respondents conduct other types of HIV/AIDS-related work. But Congress recognized that as part of that work, respondents inevitably have many opportunities to address the dangers of pros-

titution and sex trafficking. Congress wanted its private partners to adhere to its viewpoint—*i.e.*, the viewpoint that Congress expressly adopted as part of the federal program—in those interactions. That is no less government speech, simply because a foreign official, organization, or individual rather than a recipient may initiate the relevant conversation. Either way, the recipient may be called upon to deliver some message, and Congress is funding the recipient to convey *its* message—and to do so with consistency throughout its operations.

To give an example, suppose that Congress provides federal funds to conduct after-school and community programs for at-risk youth. One of those programs' stated purposes is reducing drug use by teenagers. Accordingly, as a condition of receiving federal funds, recipients must have a policy opposing teenage drug use. It should be irrelevant (Resp. Br. 41) that recipients are not conducting an actual "Just Say No To Drugs" campaign. In operating their academic or athletic programs, recipients inevitably will have many opportunities to address drug use by minors. Congress may seek to ensure that, in those countless private interactions, recipients act consistently with opposition to—not neutrality toward or promotion of—teenage drug use. And certainly Congress may ensure that recipients do not use nonfederal funds to publicly advocate for the legalization of drugs, including for minors. The National Organization to Reform Marijuana Laws would not have a constitutional right to federal funding simply because it wants to run a basketball camp or a reading program in addition to its drug legalization activities.[2]

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[2] Similarly, as the government observed in its opening brief (at 32-33), respondents' approach means that Congress could not provide

2. *Congress determined that the policy condition is an important part of the Leadership Act's comprehensive strategy*

Respondents and their amici argue that the policy condition is unnecessary or is even counterproductive to reducing the spread of HIV/AIDS. See Resp. Br. 43-45; Deans and Professors of Public Health Amicus Br. 14-27. Respondents do not explain the legal relevance of that argument, and they cite nothing to support it. Perhaps respondents intend what they meant at the certiorari stage: that Section 7631(f) is a "marginal provision" which is not "integral to the Leadership Act's goals." Br. in Opp. 29, 31 (internal quotation marks omitted). As the government has explained, however, see Pet. Br. 28-30, it is for Congress to decide when a condition on the receipt of federal funds is integral to a funding program, and it has done so here. Respondents are incorrect then to assert that they "have been enlisted by the government to fight the spread of HIV/AIDS, not to oppose or eradicate prostitution." Br. 39. Respondents have been enlisted to fight the spread of HIV/AIDS under a program that *includes*, among other things, opposing prostitution.

Perhaps respondents mean to claim instead that Congress lacked a reasonable basis for Section 7631(f), but that too would be incorrect. As respondents recognize (Br. 33), there is a current debate over how to address the public health consequences of prostitution.

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funds for racial justice in South Africa only to entities that oppose apartheid. Neither respondents nor their amici deny that. Respondents say that the hypothetical is "inapposite." Br. 42. But in discussing the sorts of limitations that they view as permissible, see Br. 42-43, it is clear that respondents do not believe the government could condition funding in that common-sense way.

Congress adopted a particular policy on that question in the Leadership Act, and it was reasonable for Congress to determine that prostitution should be eliminated (rather than legalized or neutrally condoned) because it is a "cause[] of and factor[] in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). That should end this Court's inquiry. Respondents do not point to any case in which the Court has invalidated a Spending Clause enactment on the ground that, even if it has a reasonable basis, in the Court's view the legislation is unnecessary to further Congress's stated objectives.

D. The Agencies' Affiliation Guidelines Obviate Any Constitutional Difficulty

1. Although Section 7631(f) is a permissible exercise of Congress's authority under the Spending Clause, the agencies' affiliation guidelines alleviate any difficulty by allowing recipients to cabin the effects of the funding condition to federally funded Leadership Act programs. Respondents repeat (Br. 47-48) their claim that the guidelines are inadequate because they require separation among affiliated organizations rather than programs. But as explained above, that was equally true in *Regan* and *League of Women Voters*, where recipients would have had to form separate charitable organizations and broadcast stations.[3] The Court's point in those cases and *Rust* was that when a recipient has some other outlet for the restricted activity—whether that is a

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[3] Respondents argue (Br. 51) that the recipients in *Regan* and *League of Women Voters* were only prevented from expressing themselves through their chosen media (lobbying and broadcast television, respectively). That is a distinction without a difference. Just as in this case, the funding conditions in those cases prevented recipients from expressing themselves precisely as they wished, but affiliate structures provided alternative outlets for the restricted expression.

related entity or program—the recipient may limit the effects of the funding condition to the federal program at issue. See, *e.g.*, *DKT*, 477 F.3d at 763 ("Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution.").[4]

Respondents argue (Br. 46-47 & n.13) that only compelled silence, not compelled speech, can be alleviated by providing an alternative outlet for expression. This Court has not endorsed that distinction in any other context, and it should not do so here. Respondents are simply incorrect that when a recipient must remain silent, the affiliate's ability to speak somehow "undo[es]" the compelled silence—but that when a recipient must speak, the affiliate's ability to remain silent "does nothing to undo" the compelled statement. Br. 47. Either way, the effect on the recipient is the same: its decision to accept federal funding means that its expression is permanently altered. An affiliate structure does not cancel out or negate that effect on the recipient. Rather, the value of the affiliate structure is that it allows the recipient to cabin the condition's effect to the federally funded program or services at issue. Here, nothing prevents respondents from forming affiliates and continuing to operate as they do now.

2. Finally, respondents no longer contend (Br. 45 n.12) before this Court that the agencies' guidelines are unconstitutionally vague. They argue more narrowly,

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[4] Respondents incorrectly contend (Br. 50) that they could not form special-purpose affiliates whose sole purpose is to receive and administer federal HIV/AIDS funding. Respondents primarily rely on regulations concerning private voluntary organizations (PVOs), but affiliates do not have to qualify as PVOs in order to receive Leadership Act funds.

however, that the guidelines do not provide an adequate alternative channel for expression because it can be difficult to establish an affiliate (Br. 52-56) or to determine when an affiliate is independent (Br. 48-49, 57). Those arguments are unpersuasive for largely the same reasons as respondents' previous vagueness challenge. The agencies have recognized respondents' practical concerns, amended their guidelines to accommodate them, and expressed their continued willingness to work with respondents to address them. See Pet. Br. 51.[5] Accordingly, the appropriate solution is not to enjoin the statutory scheme (as the lower courts did), but to allow respondents to bring as-applied challenges in concrete factual situations in the event that is even necessary once the agencies are permitted to implement the guidelines.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2013

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[5] Respondents challenge only Section 7631(f) of the statute, not the agencies' guidelines or award documents. In any event, HHS has informed this Office that it is currently revising its award documents to reflect its amended regulation, 45 C.F.R. 89.1(b). USAID informs this Office that it already has revised its award documents to include similar language.

APPENDIX

Constitutionally Permissible Funding Restrictions for Sex Trafficking and HIV/AIDS Prevention

OLC has considered the constitutional implications of the following funding restrictions in the Trafficking Victims Protection Reauthorization Act (TVPRA), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (USLAHATMA), and the Consolidated Appropriations Act:

(1) restrictions on the use of program funds, which require (with a minor difference between TVPRA and USLAHATMA) that program funds not be used to promote, support, or advocate the legalization or practice of prostitution, *see* 22 U.S.C. § 7110(g)(1) (as added by TVPRA § 7(7)); USLAHATMA § 301(e);

(2) organization-wide restrictions, which would require an organization receiving funds either to refrain from promoting prostitution or its legalization, *see* 22 U.S.C. § 7110(g)(2) (as added by TVPRA § 7(7)), or to have a policy explicitly opposing prostitution and sex trafficking, see USLAHATMA § 301(f); and

(3) a restriction on what may be said when an organization wants to provide information about the use of condoms as part of a project or activity funded by the Consolidated Appropriations Act, *see* Pub. L. No. 108-199, Div. D, Title II (2004).

In the limited time available to us, we have not been able to conduct a comprehensive analysis, but we have

reached the following tentative views, which might need to be altered after further analysis:

- With regard to category (1), the restrictions on the use of program funds can be constitutionally imposed on all grant recipients and sub-recipients, whether they are U.S. or foreign organizations.*

- With regard to category (2), the organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs—

  - cannot be constitutionally applied to U.S. organizations, whether they are recipients or sub-recipients, and whether they are operating inside or outside the United States;

  - can be constitutionally applied to foreign organizations whether they are recipients or sub-recipients, but only when they are engaged in activities overseas. The government could exercise its foreign-affairs and plenary immigration powers to exclude from the United States a foreign organization that advocates certain views.

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* A simple definition of a foreign organization is contained in the Mexico City Policy: an organization "that is not organized under the laws of any State of the United States, the District of Columbia, or the Commonwealth of Puerto Rico." *Restoration of the Mexico City Policy*, 66 Fed. Reg. 17303, 17303 (2001). The Mexico City Policy has withstood First Amendment challenges (though not every question has been fully litigated). Our constitutional advice here essentially mirrors the limits of the Mexico City Policy with regard to category (1) and category (2).

The government could also argue, albeit with considerable litigation risk, that it could deport a foreign organization that advocates certain views. But powers to exclude or deport are separate from grant funding, and an organization's advocacy in the United States cannot justify termination of or failure to renew a grant.

• With regard to category (3), the medical-accuracy provision can be constitutionally applied to all grant recipients and sub-recipients that choose to provide information related to condom use as part of a program or activity funded by the Consolidated Appropriations Act. We note, however, that the term "public health benefits" is not terribly clear, and an organization could not be punished for conveying views that can be reasonably characterized as an accurate statement of "public health benefits"—even if those views do not correspond to the Administration's. That ambiguity, however, could be mitigated by a suitably formal agency interpretation.

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AND
BRIEFS

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In The
Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). The ACLJ believes the government has the authority, within limits, to set eligibility criteria for grantees to assure that taxpayer funds are used in ways that are most effective to furthering the goals of the funding program. In particular, government can categorically prefer to give money to applicants who are willing to condemn inherently wrongful activity – such as prostitution and sex trafficking – when opposition to those activities is material to the program at issue.

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[1]The parties in this case have consented to the filing of this amicus brief. Letters of consent are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

When selecting among competing applicants for discretionary funding, government can look to the relevant qualifications of the applicant to ensure the effectiveness of a government program. For example, government could disqualify tobacco merchants from an anti-smoking campaign, or require a pro-democracy policy for applicants to receive funding in a program to extend democratic principles and institutions abroad. Such criteria are not unconstitutional conditions, but rather qualifications for selection akin to an individual's qualifications to carry out a job (e.g., having a bar license to be a Department of Justice litigator).

Since the funding at stake here is competitive, discretionary, and limited to a discrete program, and because application for such funding is completely voluntary, the compelled speech doctrine is no bar to the setting of qualifications for applicants. And while the "government speech" doctrine does not cover the policy requirement here – an entity's policies are its own speech, not that of the government – the government does not need to fit under that doctrine to establish legitimate, program-related qualification criteria for applicants for taxpayer funding.

The government power to attach strings to money is potent and subject to grave abuse, and this Court should reaffirm the essential constitutional limits on that power. In the present case, however, the policy requirement is no more than a permissible eligibility qualification for competitive, discretionary government grants.

ARGUMENT

Respondents contend that the anti-prostitution policy requirement in this case violates the First Amendment. It does not. If there is a problem in this case, it is that the federal government faces almost no meaningful limits upon its spending authority outside of the political process.

Although the flow of funds from the federal government to private entities for various purposes is ever expanding, the wisdom of this development is *not* the issue before this Court. Rather, the question is whether, if Congress *can* reallocate U.S. tax money to the overseas causes of its choice, be they good (as here) or bad, Congress also can ensure that those entities accepting federal funds are the ones most likely to be qualified and effective in carrying out those programs. The answer must be "yes."

I. THE FEDERAL GOVERNMENT HAS THE POWER TO SET ELIGIBILITY CRITERIA FOR GRANTEES.

The power to set up a grant program necessarily entails the concomitant power to set up a program in a way that is effective. Eligibility criteria are part of ensuring effectiveness.

It makes no sense, for example, to say that a group like NORML (opposing bans on marijuana) has a First Amendment right to receive grants under a government program to combat the use of marijuana, or that the Communist Party USA has a First Amendment right to receive grants to implement a program extending free market capitalism. Congress thus has the power, within limits, to establish

eligibility criteria, even when those criteria touch upon an applicant's speech or viewpoint. "Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *NEA v. Finley*, 524 U.S. 569, 587-88 (1998). Would-be grantees must then satisfy those criteria in order to receive taxpayer funding as part of government programs.

The policy requirement at issue here is such an instance of government setting permissible eligibility criteria for competitive funding.

A. There is a Crucial Distinction Between Permissible Eligibility Criteria and Unconstitutional Conditions.

The "unconstitutional conditions" doctrine does not invalidate the policy requirement here.

Certainly the government cannot willy-nilly use the carrot of taxpayer funding to obtain the forfeiture of constitutional rights. While he who "pays the piper" generally gets to "call the tune," *Democratic Senatorial Comm. v. FEC*, 660 F.2d 773, 781 (D.C. Cir. 1980) (per curiam opinion of Wright and GINSBURG, JJ.), this Court has repeatedly "recognize[d] a limit on Congress' ability to place conditions on the receipt of funds," *Rumsfeld v. FAIR*, 547 U.S. 47, 59 (2006). In particular, "'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Id.* (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003) (plurality)). A number of this Court's cases exemplify this "unconstitutional conditions" doctrine. *E.g.*, *FCC*

v. League of Women Voters of Cal., 468 U.S. 364 (1984); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

That does not mean, however, that Congress must be indifferent to the *qualifications* of the applicants for federal grants. "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, . . ., it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). In the same way, Congress need not ignore whether applicants for funding under a government program in fact support the goals they are expected to promote. An overseas campaign *against* abortion can disqualify groups that *do* abortions, even on their own time and money, just as an overseas campaign to *increase* access to abortion could presumably disqualify groups that *oppose* abortion, even on their own time and money.

Here, the federal program aims to fight the spread of HIV/AIDS. It is perfectly reasonable for the program to prefer, indeed to insist upon, grantees who expressly oppose sexually exploitative and irresponsible activities like prostitution and sex trafficking, which are activities that contribute to the spread of the very pathologies the government program is trying to halt.

B. Eligibility Criteria for Competitive Funding of a Discrete, Limited, Discretionary Program Do Not Compel Speech.

The compelled speech doctrine does not require a different result.

1. The compelled speech doctrine

To be sure, the government violates the First Amendment when it coerces involuntary speech from a private party, for example when the government extracts statements of points of view on ideologically contested issues. *Wooley v. Maynard*, 430 U.S. 705 (1977). And, of course, coercion need not come in the form of a gun to the head. Government may not "leverage . . . subsidies . . . into a penalty on disfavored viewpoints," *NEA v. Finley*, 524 U.S. at 587. Where the government denies generally available public benefits because the target declines to adopt a particular policy – e.g., no welfare benefits to those who do not profess to support the idea of reducing the federal budget, or no access to a forum for speech by those who refuse to take the position that all religions are equally valid – this blatantly infringes upon the First Amendment right to free speech (and freedom of thought as well). The government cannot make ideological conformity the price of the incidents of citizenship. "Authority here is to be controlled by public opinion, not public opinion by authority." *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.*

2. Absence of speech compulsion here

Here, however, the government requires no speech at all – application for grants is purely voluntary. Nor

does the government engage in indirect coercion, for example by imposing conditions upon generally available public benefits like use of a park or highway, receipt of medical safety net coverage, or admission to state schools or their programs. As in the striker/food stamps case, *Lyng v. Int'l Union*, 485 U.S. 360 (1988), the government has merely adopted rules that disqualify certain applicants – in *Lyng*, individuals on strike; here, entities that refuse to declare opposition to prostitution and sex trafficking – from eligibility to receive certain government funds. Just as it was permissible for the government to require libraries to adopt Internet filters in order to receive certain government funding, *Amer. Library Ass'n*, so here it is permissible for the government to require entities to have a policy against prostitution and sex trafficking in order to receive funding to combat the very ills these behaviors help propagate.

3. Important doctrinal limits

It is important to emphasize the limited nature of the government power to attach conditions to funding. In addition to the First Amendment principles discussed elsewhere in this brief, funding conditions must at a minimum be related to the legitimate government interests that the program is intended to further. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Excluding entities from federal funding programs just because they decline to espouse a particular viewpoint, regardless of the lack of a connection to the purposes of the particular program at issue, would fail this threshold test and thus unconstitutionally penalize those entities for their speech (or refusal to speak).

More generally, there is a difference in kind between, on the one hand, the imposition of eligibility criteria in a discretionary program affecting a small, voluntary pool of applicants, where the eligibility criteria tie directly to the program at issue, and on the other hand, the imposition of policy-linked disqualifiers upon an entire subset of the population, or upon the receipt of common or universally available benefits, or upon the disbursement of benefits having no obvious connection to the program at issue. Discretionary funding for overseas programs, for example, is not the same as entitlement to a child tax credit. Setting criteria for a small set of NGO's seeking program grants is materially distinct from imposing speech-linked requirements on parents wishing to send their children to public schools. And hinging funding for the fight against sexually transmitted diseases upon a policy against sexually irresponsible behavior is different in principle from requiring public fealty to, say, same-sex marriage as a condition of receiving a business license.

4. The need to cabin *CLS v. Martinez*

One recent decision of this Court would appear to undermine these crucial limiting principles – *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010) – but that case should not control the analysis going forward, either because it should be limited to its facts or because it should be repudiated.

In *CLS*, a government entity imposed the requirement that, as a condition of the benefits available to student clubs, every club must adopt a policy of indifferentism regarding religion and sexual behavior. *Id.* at 2979-81. In other words, student

groups were relegated to second-class status unless they in effect professed that a member's religious beliefs were irrelevant to the identity and effectiveness of a religious club, and that one's departure from traditional Christian sexual norms – and the consequent scandal – was irrelevant to the mission integrity of a Christian group.

Contrary to the principles described above, the policy requirement in *CLS* was not limited to participation in a particular, discretionary program – e.g., a student workcamp project aimed at helping AIDS victims. Nor was the requirement limited to a small subset of the population – e.g., those applying for an assistantship position in the "diversity office" or campus chaplaincy. Instead, the rule was imposed upon the entire relevant universe – all students attending the state law school – as a condition of a standard, generally available benefit – forming a recognized club. Furthermore, the requirement was not directly linked to the program at issue: a policy on religion or sexual behavior generally has nothing to do with student club activities, and where such a policy might be relevant, it could as easily be completely counterproductive, indeed nonsensical – e.g., forcing a Jewish club to allow Muslim or Christian officers.

To the extent that *CLS* stands for the proposition that the above-described essential limits on governmental power to impose ideological strings on benefits are in fact no limits at all, it should be overruled. To the extent that *CLS* says a government body – in that case, a law school, but by parity of reasoning also a municipality, a state, or the federal government – can extract a pledge of submission to the currently regnant ideology or else impose second-class status upon the population it governs, the *CLS* decision

is deeply and fundamentally inconsistent with liberty in general and free speech in particular, and should be overruled.

At a minimum, *CLS* must be read as limited to its peculiar facts. The *CLS* Court observed that, while a Christian group bizarrely had to agree that its officers need not be Christian and need not profess to follow Christian norms, such a group could nevertheless adopt "generally applicable membership requirements unrelated to status or beliefs." *Id.* at 2979 n.2 (internal quotation marks omitted). If these permissible "good-behavior," "attendance, [and] skill measurements" requirements, *id.*, allow a club to maintain its identity and integrity – e.g., by treating profound ignorance or disregard of the club's Christianity-derived norms as a disqualifier – then *CLS* would stand only for the dangerous, but more narrow, proposition that clubs must *profess* indifference to their identity but may nevertheless *maintain* group mission coherence through conduct and skill requirements.

In sum, if *CLS* is taken at face value, the present case is easy indeed. Obviously, if a government body can relegate to second-class status those who do not profess adherence to a deeply controversial policy position, even in the context of access to a speech forum, then *a fortiori* the government can require espousal of a policy condemning activities traditionally regarded as evil, as a condition of receipt of special discretionary funding in a program addressing the consequences of that evil. But because *CLS* is so profoundly inconsistent with broader, preexisting First Amendment principles – principles *CLS* did not purport to overturn – this Court should not rely upon *CLS* here, but rather should disavow its pernicious holding.

The government does not need *CLS* to prevail in this case.

II. THE POLICY REQUIREMENT IS CONSTITUTIONAL INDEPENDENT OF THE "GOVERNMENT SPEECH" DOCTRINE.

Nor does the government need the "government speech" doctrine to prevail here.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Here, however, the anti-prostitution and anti-sex trafficking policy the government requires of grantees is not *government* speech, but rather a policy *the grantee itself* must have. Nor is this a case where the government is dictating the parameters of an entity's speech within the four corners of the government program, as in *Rust v. Sullivan*, 500 U.S. 173 (1991). Hence, the "government speech" doctrine is not controlling here.

The government speech doctrine, however, does not exhaust the government's authority to set rules for grantees. The government can constitutionally require that a grantee, for example, be a tax-exempt entity, or certify its compliance with Title VII or OSHA obligations, or have the necessary plant facilities to complete a certain government project. Eligibility criteria of these sorts are part and parcel of the government's ability to negotiate work bids, or allocate competitive grants. And as already discussed, *supra* § I, the policy requirement here is a permissible eligibility requirement.

CONCLUSION

This Court should reverse the judgment of the Second Circuit.

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IN THE

Supreme Court of the United States

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AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

—v.—

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF *AMICI*[1]

The "freedom to think as [one] will and to speak as [one] think[s]" embraces the central promise of the First Amendment. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Yet, a provision of the Leadership Act, at the heart of this case, tells recipients of federal funding what they must think about prostitution.

Congress enacted the Leadership Act in 2003, to combat three significant international public health problems: HIV/AIDS, tuberculosis, and malaria.[2] The statute funds a wide range of public health initiatives, such as the development of vaccines and treatment protocols. It also seeks to encourage a broad range of non-Governmental Organizations (NGOs) to join in this effort either individually or in conjunction with governmental agencies. 22 U.S.C. § 7603(4).

The statute, which is directed at public health measures and treatment protocols, includes a provision specifying that none of the funds made available may be used "to promote or advocate the legalization or practice of prostitution . . . ." 22 U.S.C. § 7631(e). That section of the statute has not been challenged in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. None of the parties or their counsel authored this brief in whole or in part, and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

[2] United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7601 *et seq.*

The section of the Act that has been challenged in this case reaches far beyond the federally funded speech of grant recipients. Specifically, § 7631(f) mandates that "no funds made available to carry out [the] Act . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution . . . ." This requirement does "not apply to the Global Fund to Fight AIDs, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." *Id.* All other grant recipients, including Respondents, must either comply with the Anti-Prostitution Pledge or forego participation in programs under the Leadership Act.[3]

The international public health community remains divided over the question of how best to work with those engaged in prostitution and how to address prostitution in the fight against HIV/AIDS. The Leadership Act nonetheless compels those participating in its programs (except the exempted groups) to affirm their ideological commitment to the government's prescribed view, even if their government-funded projects have nothing to do with the commercial sex trade. The statute thus deeply implicates the First Amendment right "to think as [one] will and to speak as [one] think[s]."

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[3] Respondents in this case are organizations whose mission statements clearly reflect their organizational values. *See, e.g.*, Mission & Vision, Pathfinder International, http://www.pathfinder.org/about-us/mission/; Mission & Values, Open Society Foundations, http://www.opensocietyfoundtions.org/about/mission-values.

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. Both organizations have long been devoted to the protection and enhancement of fundamental rights. Among the most fundamental of rights are the rights of expression and personal belief secured by the First Amendment. Accordingly, the ACLU and NYCLU respectfully submit this brief to address the significant First Amendment issues raised by this controversy.

SUMMARY OF ARGUMENT

The congressional enactment at issue in this case seeks to use the power of the purse to require recipients of public health funding to subscribe to the government's own ideological position on prostitution, and to affirm their allegiance to the government's position by submitting a pledge of support to the government. The challenged provision violates core First Amendment principles that prohibit the government from compelling private belief.

Petitioners seek to avoid the force of this First Amendment prohibition by advancing two principal arguments. First, they assert that the obligation imposed by the Anti-Prostitution Pledge is permissible under the Spending Clause of the Constitution and that public health organizations that object to the Anti-Prostitution Pledge can either decline government funding or establish affiliated

organizations that are free to say what they want with their own money. Alternatively, Petitioners assert that this case presents an example of the government enlisting recipients of funding to convey the government's own message. Accordingly, Petitioners argue that this case involves the "government as speaker" rather than the government as the regulator of private speech and belief. Neither of these arguments avoids the constitutional problems inherent in the statute.

The government's affiliation argument might have more force (depending on the nature of the affiliation requirements) if this case involved a challenge to the provision of the Act providing that government funds cannot be used "to promote or advocate the legalization of prostitution." It does not. The Anti-Prostitution Pledge being challenged in this case amounts, in effect, to a loyalty oath. Unlike the loyalty oaths of the past, however, the Anti-Prostitution Pledge does not command loyalty to the nation; instead, it commands fealty to the government's policy positions. In doing so, it does not dictate the terms of public discourse but the content of private belief. The fact that the grant recipient may be allowed to speak out of the other side of its mouth through an affiliated organization that is not receiving government funds does not redress the constitutional injury caused by the government's effort at thought control. At best, it invites hypocrisy.

The government's effort to justify its Anti-Prostitution Pledge by invoking the government speech doctrine is equally flawed. The government acknowledges that § 7631(f) merely requires grantees to have a policy opposing prostitution. Pet. Br. At 27.

For most grant recipients, including Respondents, that is the end of the matter. They are not required to convey the government-imposed message on prostitution to anyone but the government. Accordingly, they cannot be described as government messengers without distorting that concept beyond all recognition. And, the government's claim that the Anti-Prostitution Pledge is necessary to ensure that the government's goals will be pursued with "consistency, force, and scope," *id.* at 28, is fatally undermined by the fact that major grant recipients are exempted from the Pledge requirement.

In short, the Anti-Prostitution Pledge has less to do with government messaging than ideological conformity. That is not a price that the government may exact, even when the government is administering a grant program. To be sure, the government may require grant recipients to spend government funds for their intended purposes. Thus, the government has the right to monitor the activities of government grantees to ensure their compliance with grant conditions. Under certain circumstances, the government can also regulate government funded speech, most obviously when private parties are hired to serve as government spokespeople. But any attempt by the government to dictate the thoughts or beliefs even of those it is funding crosses a critical constitutional line. For that reason alone, the Anti-Prostitution Pledge cannot be sustained and the decision below must be affirmed.

ARGUMENT

THE ANTI-PROSTITUTION PLEDGE VIOLATES FREEDOM OF BELIEF BY IMPOSING THE EQUIVALENT OF A LOYALTY OATH

A. The First Amendment Prohibits The Government From Imposing A System Of Ideological Conformity

The constitutional injury at issue here involves more than a limitation on the right to speak. The Anti-Prostitution Pledge tells funding recipients what they must think. It, therefore, compromises "[one's] freedom to think as [one] will." *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring). By compelling recipients of funding to sacrifice their ideological autonomy and integrity, it violates the First Amendment.

The Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991), is instructive in this regard. In upholding the funding restrictions at issue in *Rust*, the Court was careful to note that, although individuals carrying out a Title X project "must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral," the regulations "govern solely the scope of the Title X project's activities [and] do not in any way restrict the activities of those persons acting as private individuals." *Id.* at 198-99. When asked about abortion or other matters that were beyond the scope of the Title X project, "[n]othing in [the Title X regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." *Id.* at 200.

The Anti-Prostitution Pledge does precisely that. In order to participate in the program to treat

HIV/AIDS, tuberculosis, and malaria, grant recipients must adopt as their own a government-mandated position regarding prostitution that they might not in fact hold or wish to express. The Anti-Prostitution Pledge thus intrudes into private belief and ideological conviction in ways that were not at issue in *Rust*.

The Anti-Prostitution Pledge does, however, resemble the pledges and oaths that this Court has repeatedly found impermissible because they impose an orthodoxy of belief. Most famously, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court invalidated the requirement that students pledge allegiance to the flag. Writing for the Court, Justice Jackson characterized the compulsory flag salute and pledge as an "affirmation of a belief," *id.* at 633, and observed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. The Court concluded that the very purpose of the First Amendment is to preserve this "sphere of intellect and spirit" from "all official control." *Id.*

Since *Barnette*, this Court has continued to recognize that the right to hold one's personal "beliefs and to associate with others of [like-minded] political persuasion" lies at the core of the First Amendment. *Elrod v. Burns*, 427 U.S. 347, 356 (1976). In *Elrod*, for example, the Court upheld a claim that the termination of public employees on the basis of party affiliation was impermissible under the

First Amendment. And, in *Speiser v. Randall*, 357 U.S. 513, 514-15 (1958), the Court invalidated a requirement that veterans applying for a property tax exemption subscribe to an oath disavowing the overthrow of the government and any support of foreign governments hostile to the United States. Concurring in *Speiser*, Justice Douglas wrote: "I know of no power that enables any government under our Constitution to become the monitor of thought." *Id.* at 538 (Douglas, J., concurring). *See also Wooley v. Maynard*, 430 U.S. 705, 707, 714 (1977) (invalidating criminal sanctions for concealing state motto on vehicle license plates in recognition of "a broader concept of 'individual freedom of mind,'" of which the speech right is a component (citation omitted)).

Efforts by the government to become a "monitor of thought" are anathema to a democratic society: they erode individual dignity, they compromise the integrity of ideological principles held by issue-oriented organizations, and they limit public debate. This case illustrates the problem. The Anti-Prostitution Pledge inevitably forces grantees who do not agree with the government's position on prostitution (or who may have no position on the issue at all), into an unconstitutional dilemma: by submitting to the Pledge they must either "forego any contrary convictions of their own" and "become unwilling converts" to government orthodoxy, or "simulate assent by words without belief and by a gesture barren of meaning." *Barnette*, 319 U.S. at 633. The lesson of history, which is well worth heeding, is that "all attempts to influence (the mind) by temporal punishment, or bur[d]ens, or by civil incapacitations, tend only to beget habits of

hypocrisy and meanness . . . ." *Id.* at 646 (citation omitted) (Murphy, J., concurring).

This Court's cases identify several hallmarks of a prohibited loyalty oath, all of which are present in this case. The Anti-Prostitution Pledge requires citizens to affirm their allegiance to a government-prescribed view; it imposes concrete obligations; and it is centrally concerned with ideology. Because it is a mandatory statement of ideological conformity, the Anti-Prostitution Pledge oversteps the clear boundaries of the First Amendment.

1. The Anti-Prostitution Pledge requires grantees to submit to the government a written expression of loyalty to the government's own ideological position. 22 U.S.C. § 7631(f); JA 114 ¶¶5, 7. This Court has long and properly recognized that such government-induced oaths threaten core First Amendment values. *See, e.g., Whitehall v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

The explanation for those holdings is both simple and fundamental. Our constitutional system rests on the premise that the just powers of the government are derived from the consent of the governed, but that premise is undermined if the people's consent is coerced.

This Court has also recognized that a different calculus applies to the ceremonial oaths administered to government officials. As an initial matter, of course, the Constitution itself refers to such oaths. *See* U.S. Const. Art. II, § 1, cl. 7 (presidential oath); U.S. Const. Art. VI, cl. 3 (oath for

federal elected officials and civil servants). But, just as importantly, such oaths are designed to "assure that those in positions of public trust [are] willing to commit themselves to live by the constitutional processes of our system."[4] *Cole v. Richardson*, 405 U.S. 676, 684 (1972).

Thus, this Court has been careful to distinguish between oaths that bind government officials to respect the Constitution, and oaths that bind private citizens to accept the government's ideology. The Anti-Prostitution Pledge falls into the latter category. As Justice Douglas observed in *Speiser*, "When we allow government to probe [one's] beliefs and withhold . . . some of the privileges of citizenship because of what [one] thinks, we do indeed 'invert the order of things,' to use Hamilton's phrase." 357 U.S. at 536 (Douglas, J., concurring) (citation omitted).

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[4] Several *per curiam* decisions by the Court almost fifty years ago relied on similar reasoning to uphold a series of loyalty oaths for teachers. *Ohlson v. Phillips*, 397 U.S. 317 (1970) (*per curiam*); *Hosack v. Smiley*, 390 U.S. 744 (1968) (*per curiam*); *Knight v. Bd. of Regents*, 390 U.S. 36 (1968) (*per curiam*). Those decisions have not been revisited since. In addition, the Court sustained a form of loyalty oath for organized labor leaders in *American Communications Association v. Douds*, 339 U.S. 382 (1950), but that Cold War ruling does not support the government's position in this case. First, the holding in *Douds* rested on the government's asserted interest in protecting against "obstructive strikes . . . designed to serve ultimate revolutionary goals." *Id.* at 388. That interest obviously has no relevance here. Second, the precedential value of *Douds* was severely undermined by this Court's subsequent decision in *United States v. Brown*, 381 U.S. 437 (1965). Third, even *Douds* recognized that political beliefs and affiliations are ordinarily impermissible subjects of government action. 339 U.S. at 391.

2. The Anti-Prostitution Pledge also imposes a twin set of onerous and specific obligations on the grantees that sign it. First, it requires grantees to embrace a specific ideological position on an issue that is the subject of considerable public debate, that may have nothing to do with the actual tasks that they have agreed to undertake in exchange for the government grant, and that may be contrary to an ideological position that the grantee has previously held. Second, because the Anti-Prostitution Pledge is a condition of the grant, it invites government monitoring of a grantee's words and actions to ensure compliance with the Pledge, even assuming that those words and actions are unrelated to the government-funded project that the grant was intended to support. It is clear from the record that grantees fully understand both the obligations that flow from signing the Pledge and the penalties they risk by violating it. JA 151 ¶ 20, 126 ¶¶ 21-22.

In this way, as well, the difference is stark between the Anti-Prostitution Pledge and a traditional oath of office. *See Bond v. Floyd*, 385 U.S. 116, 135 (1966); *Cole*, 405 U.S. at 685-86. The Pledge is not an aspirational statement. It seeks to compel orthodoxy through compelled statement of belief enforced by the threat of serious financial sanctions for any deviation from the government's prescribed view.

3. Most fundamentally, the Anti-Prostitution Pledge is ideological by its very nature. By contrast, forward-looking promissory oaths by public officers do not constrain the beliefs of public officeholders but place ideologically neutral parameters on their official actions. *Connell v. Higginbotham*, 403 U.S.

207, 209 (1971) (Marshall, J., concurring in the result). Similarly, state requirements that certain documents bear official seals or stamps containing a specified symbol or motto are acceptable because the purpose of such a mark is ideologically neutral, namely, providing verification of the document's origin. *Wooley*, 430 U.S. at 715 n.11. Likewise, in *Rust*, the funding conditions attached to the Title X family planning program aimed "to ensure that the limits of the federal program [were] observed," and in particular to limit the program to pre- as opposed to post-conception family planning. 500 U.S. at 193. This pragmatic purpose was reasonably carried out through restrictions on the speech of program participants because the funded activity itself consisted in part of speech, namely, the provision of medical counseling and referrals concerning family planning.

While oaths and pledges consisting of forward-looking promises serving practical ends may be permissible, "belief as such cannot be the predicate of governmental action." *Connell*, 403 U.S. at 210 (Marshall, J., concurring in the result). The government may not put citizens in the position of actually or apparently "asserting as true" the government's point of view. *Wooley*, 430 U.S. at 721 (Rehnquist, J., dissenting). That is precisely the case here where grantees must state, not that the government disapproves of prostitution, but that the organization itself does. The Pledge thus excludes those with opposing views (or no view at all) from funding eligibility, regardless of whether disagreement over prostitution would in any way have affected funded activities.

B. The Government May Not Use Its Spending Power To Impose Ideological Oaths

The First Amendment prohibits government from regulating expressive activities on the basis of viewpoint discrimination. In *Rosenberger v. Rector of and Visitors of the University of Virginia*, 515 U.S. 819 (1995), this Court recognized that "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 828-29 (internal citation omitted). In this case, the Anti-Prostitution Pledge clearly regulates the expression of funding recipients on the basis of viewpoint. By its terms, the provision requires recipients of funding to espouse a narrow point of view prescribed by the government on prostitution. Resp. Br. at 29-34.

Application of the First Amendment prohibition against viewpoint discrimination to the statutory provision at issue here would require that the government demonstrate that the statutory regime is narrowly tailored to the advancement of a compelling interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983). Petitioners never even seek to satisfy this standard.

They argue, instead, that the First Amendment prohibition against viewpoint discrimination is inapplicable because the funding conditions imposed by the statute constitute a permissible "exercise of Congress's authority under

the Spending Clause." Pet. Br. at 16. But, where the core freedom of belief is concerned, it is immaterial whether the pressure to conform is applied directly or indirectly. Because freedom of political belief lies at the heart of the First Amendment, government may not burden that freedom, "[r]egardless of the nature of the inducement." *Elrod*, 427 U.S. at 356. Indeed, most cases in which a loyalty oath was invalidated involved employment, which the applicant in theory remained free to take or leave. *See, e.g., id.* at 347; *Connell*, 403 U.S. 207; *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian*, 385 U.S. 589.

It is thus irrelevant that what is at stake in the instant case is eligibility for government funding. Although, in theory, potential grantees remain free to "walk away" from the disease -prevention funding distributed under the Leadership Act, the very existence of an incentive to forfeit one's freedom of belief is itself unconstitutional. In fact, an essential characteristic of impermissible loyalty oaths is precisely their self-executing character, where the would-be recipient of a governmental benefit is faced with the option of pledging loyalty or foregoing the benefit. In this context, even the withholding of a gratuity is "tantamount to coerced belief." *Elrod*, 427 U.S. at 355 (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

Whatever constitutional safety net may be provided in other contexts by allowing government-funded grantees to create privately funded affiliates, the possibility of affiliation does not work in this context. In three significant cases, this Court has

examined the constitutional limits of conditioning government financial benefits upon the waiver of First Amendment rights and explored the possibilities of an affiliation solution. In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), a non-profit entity challenged a provision that prohibited 501(c)(3) organizations from engaging in "substantial lobbying." *Id.* at 541-42. Even though it is well recognized that lobbying is protected by the First Amendment, *see United States v. Harriss*, 347 U.S. 612, 625-26 (1954); *United States v. Rumley*, 345 U.S. 41, 46 (1953), the Court upheld the tax measure largely upon the ground that the entity could create a separate affiliate under 26 U.S.C. § 501 (c)(4) to engage in lobbying and, therefore, the restriction did not significantly burden First Amendment rights.

In *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984), the Court found impermissible a provision of the Public Broadcasting Act that prohibited stations receiving federal funds from taking editorial positions and "from using even wholly private funds to finance its editorial activity." *Id.* at 400. In doing so, the Court observed that the provision would have been valid if, as in *Regan*, the stations remained free to establish affiliate organizations to take editorial positions with non-federal funds. *Id.*

In *Rust v. Sullivan*, *supra*, the Court reviewed a federal regulation that pertained to the funding of "family planning" programs that focused on pre-conception services relating to birth control and preventing unwanted pregnancies. *See* 500 U.S. at 178. Because post-conception and prenatal services were beyond the scope of the program, the

regulations at issue in that case prohibited the use of federal funds to provide abortion counseling. *See id.* at 178-79. The Court upheld the prohibition in the face of a First Amendment claim that the condition limited the capacity of physicians to counsel patients regarding the availability of abortion. *Rust* is best understood as a case in which abortion counseling was beyond the scope of the funded program. Nevertheless, in rejecting the First Amendment argument advanced in that case, the *Rust* Court observed, as in *Regan*, that the recipients of funding remained free to engage in "abortion-related speech" with private money in programs that remain "separate and distinct" from the federal program. *Id.*at 196.

The principle that emerges from *Regan*, *League of Women Voters*, and *Rust* is that conditions limiting free speech in a government-funded program are generally unconstitutional unless, at a minimum, they allow ample opportunities for the grant recipients to speak with private funding or through affiliated organizations.[5] Here, providing alternative opportunities to speak through an affiliated organization will not cure the constitutional injury created by the Anti-Prostitution Pledge. That is because the constitutional injury in this case does not flow only from what grantees are prohibited from saying in a government-funded program, but also from what they are required to affirm to participate in that program. There may be circumstances in

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[5] Of course, where the requirements necessary to create an affiliate are unduly burdensome and impractical, the affiliate regime cannot cure the constitutional injury. *See* Resp. Br. at 52-58.

which compelled silence in one context can be made up for by permitted speech in another context. A compelled affirmation of belief, however, binds an organization until it is repudiated, which can only be done at the cost of disqualification from the federal program. It also compromises the ideological integrity of recipient organizations. The creation of an affiliated entity does not solve this constitutional problem.

C. This Is Not A Case About Government Speech

The Anti-Prostitution Pledge cannot plausibly be described as government speech because it involves an ideological commitment demanded *by* the government and delivered *to* the government without any requirement that the grantees disseminate it more broadly. Pet. Br. at 27 ("Section 7631(f) only requires recipients to have such a policy; it does not require them to actively disseminate that policy to foreign nationals.").

The content of the Pledge also belies any claim that it is communicating a government message. By signing the Pledge, a grantee merely affirms the grantee's own opposition to prostitution. Pet. Br. at 22. Accordingly, those who sign the Pledge are not converted into the government's messenger by that fact alone. The government does not claim otherwise. Indeed, the government candidly acknowledges that "only some recipients will actively convey [the government's] message [on prostitution] by implementing federally funded projects aimed at reducing the commercial sex trade." *Id.* at 27. Respondents are not among those grantees that have

been enlisted to covey the government's message. *See Rosenberger*, 515 U.S. at 833.

Furthermore, Respondents are ultimately responsible for the position that they must take as a result of the Anti-Prostitution Pledge, including the damage to their credibility and the diminished effectiveness of the program. The United States does not view the NGOs as its agents and does not accept responsibility for their speech or conduct. *See Rosenberger*, 515 U.S. at 835 (holding that student groups are not government speakers where the University has declared that the groups are not its agents, not subject to its control, and not its responsibility). It cannot claim a sliver of the NGOs' ideology as its own when it suits its agenda.

Finally, the government's contention that the Anti-Prostitution Pledge is necessary to ensure the "consistency, force, and scope," *id.* at 28, of the anti-prostitution message that the government itself is attempting to convey through its Leadership Act programs is both fatally overinclusive and under-inclusive. It is overinclusive because it applies to grant recipients who "[do] not promote prostitution . . with non-federal funds," *id.* at 27, and thus do not pose a risk of garbling the government's message. It is underinclusive because, as noted above, *see* p. 2, *supra*, major grant recipients are excluded from the Pledge requirement. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999) (broadcast ban on casino advertising "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("the facial underinclusiveness of [Florida's rape shield law]

raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests [that Florida] invokes" in its support").

In applying the government speech doctrine, some courts have asked "whether a reasonable and fully informed observer would understand the expression to be government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 487 (2009) (Souter, J., concurring in the judgment); *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life of Illinois, Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008). Here, "a reasonable and fully informed observer," aware of the circumstances, would understand that grantees who sign an Anti-Prostitution Pledge are not speaking for the government, and that the Anti-Prostitution Pledge is not "meant to convey and [does not have] the effect of conveying a government message." *Summum*, 555 U.S. at 472.[6]

This fact-specific inquiry avoids turning "free speech doctrine into a jurisprudence of labels." *Summum*, 555 U.S. at 484 (Breyer, J., concurring). It thus advances the purpose of the government speech doctrine while ensuring "political safeguards . . . adequate to set [government speech] apart from private messages." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 563 (2005). There is no doubt that "[t]o

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[6] This Court has adopted a similar approach in distinguishing "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercises Clauses protect." *Bd. of Educ. of Westside Comty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., opinion) (emphasis in original).

govern, the government has to say something." *Id.* at 574 (Souter, J., dissenting). But it is equally clear that the line between government speech and private speech must be carefully policed.

On the one hand, political accountability is not possible if the government is allowed to "behave like puppet masters who create the illusion that [citizens] are engaging in personal expression when in fact the [government] is pulling its strings." *Nurre v. Whitehead*, 130 S. Ct. 1937, 1939 (2010) (Alito, J., dissenting from denial of certiorari). On the other hand, allowing the government to claim private speech as government speech permits an end run around fundamental First Amendment principles that otherwise prohibit the government from compelling individuals or organizations from adopting the government's beliefs as its own. *Johanns*, 544 U.S. at 568 ("The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them . . . .") (Thomas, J., concurring). This case presents the latter situation.

Petitioners' argument that the government speech doctrine applies to the Anti-Prostitution Pledge would eviscerate any "political safeguards" to the government speech doctrine. *Johanns*, 544 U.S. at 563. It would allow the government to spend some small amount of money to buy any volume of speech in the government's favor. If the government's view of the government speech doctrine were to prevail, it could require that every entity receiving any amount of public funds—NGOs, schools, hospitals—declare its wholesale support for all policies of the incumbent

government. The political landscape would then look dramatically different to the reasonable observer. The First Amendment does not tolerate such distortions in the marketplace of ideas.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AND THE CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether it is consistent with the First Amendment for the government to condition the receipt of a grant on the recipient's agreement to make an affirmative policy statement that may be antithetical to the recipient's beliefs.

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INTEREST OF THE *AMICI CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm dedicated to the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has frequently advocated both as counsel and as *amicus curiae* for equal access to government funding and facilities for religious organizations under the Free Speech Clause and the Religion Clauses. *See, e.g.*, *Bronx Household of Faith* v. *Bd. of Ed. of the City of New York*, No. 12-2730 (2d. Cir., argued Nov. 19, 2012; *amicus curiae* supporting Free Exercise challenge to City regulation denying equal access to public school buildings);[2] *ACLU of Mass.* v. *United States Conf. of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013) (*amicus curiae* opposing Establishment Clause challenge to government contract with Catholic bishops' conference to provide rehabilitation services to victims of sex trafficking).

The Becket Fund is concerned that adopting the government's theory in this case—under which the

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have consented to this filing.

[2] Brief available at http://www.becketfund.org/wp-content/uploads/2012/10/Bronx-2d-Cir-amicus-vFINAL-timestamped.pdf.

spending power would confer virtually unlimited authority to compel grant recipients to endorse the government's policy views—would give federal, state, and local governments unprecedented and unwarranted control over religious groups' expression of their own beliefs.

The Christian Legal Society ("CLS") has long believed that the pluralism that is essential to a free society prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their speech. For that reason, CLS was instrumental in passage of the Equal Access Act of 1984, which protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074 (2011); *see* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement). CLS is proud of its 35 years of work to protect free speech and expressive association for all citizens.

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at public and private law schools. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students and who welcome all students who care to attend. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of traditional Christian belief.

CLS's legal advocacy arm, the Center for Law and Religious Freedom, works to protect religious beliefs and practices, as well as to preserve the autonomy of religion and religious organizations from the govern-

ment. The Center strives to preserve religious freedom in order that men and women remain free to do God's will. As the Nation's founding instrument acknowledges as a "self-evident truth," all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights are religious liberty and freedom of speech.

While the particular government-mandated policy at issue in this case would uphold religious and moral values that CLS supports, the legal principle that the government seeks to establish would allow federal, state, and local governments to coerce religious organizations to adopt policies completely contrary to their religious beliefs as the price for their participation in civil society. The consequent damage to free speech, religious liberty, and social pluralism would be immense.

SUMMARY OF ARGUMENT

This case is about far more than prostitution and HIV/AIDS. The expansion of the modern regulatory state has increasingly led to financial involvement of the government with private organizations—including churches, religious universities, and religious charities—in ways that potentially give the government power over those organizations.[3] Tax exemptions, which have been treated by this Court as tantamount to the provision of funds, are a prominent example. Student loans and grants, which are likewise treated as equivalent to direct payments to the uni-

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[3] We use the generic term "church" in this brief to refer to houses of worship of all different religious traditions.

versity, are another. Numerous other examples exist, including the direct grants at issue here.

Under the government's theory in this case, federal, state, and local governments may use these kinds of government funding programs as leverage to pressure organizations into affirmatively expressing particular government-prescribed views as the organizations' own. For instance, if a government wants to pressure such groups to avow that they support or oppose contraception, pacifism, abortion, the death penalty, assisted suicide, or whatever other policy those then in control of the government choose, then that government would be free to do so.

For the reasons discussed below, that cannot be right. Such a "get with the program" power would let the government badly distort the marketplace of ideas by strengthening groups that toe the government line and financially crippling groups that refuse to say what the government demands. And such a power to coerce ideological conformity would unacceptably burden religious groups' rights to speak or not speak in accordance with the truth as they see it.[4] "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Va. Bd. of Ed.* v. *Bar-*

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[4] Because of their exclusive focus on religious liberty, in this brief *amici* address the ill effects of the government's proposed rule on religious organizations. They note, however, that many, and perhaps most, non-religious organizations with moral or conscientious commitments will suffer identical problems under the rule proposed by the government.

nette, 319 U.S. 624, 642 (1943). Likewise, no official should be permitted to acquire such a power by using the government's vast resources as a tool for control of groups that participate in government programs.

Contrary to the government's view, a government's recognized power to *limit* speech within the programs that it funds cannot justify a power to *compel* speech as a condition of government funding. Government programs that limit what can be said within the programs typically leave participants ample alternative means of exercising their rights to speak as they see fit. The participants just have to engage in their preferred speech outside those programs.

But when the government compels an organization to say things—even if only through an affiliate—as a condition of participating in a program, then the organization cannot avoid saying those things. It thus has no alternative means of exercising its Free Speech Clause right *not* to speak while still participating in the program.

Moreover, once an organization is pressured to state a policy with which it does not agree, even through an affiliate, its ability to express contrary views outside the program will be undermined. Saying one thing in the program and the opposite outside will make the organization appear at best equivocal and at worst hypocritical. Thus, by compelling the endorsement of a government policy as a condition of accessing government-controlled funds, the government will have the power to effectively restrict the program participant's speech even outside the government program—a power this Court's cases have rightly rejected.

ARGUMENT

I. The government's proposed rule would give it startling power over religious and educational institutions, and thus badly damage the marketplace of ideas

Federal, state, and local governments spend over 35% of the nation's Gross Domestic Product every year,[5] with much of it flowing directly or indirectly through nearly all American churches, religious universities, and other nonprofits founded around deeply felt moral beliefs. Under the government's theory in this case, a government could use these funds as leverage to pressure any such group into pledging allegiance to the government's preferred policies.

Take, for example, the income and property tax exemptions for nonprofits (including religious nonprofits, which will be the main focus of this brief) and the income tax deduction for charitable contributions. This Court has held that these tax provisions are "a form of subsidy that is administered through the tax system":

> A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of sub-

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[5] *See* Office of Management & Budget, *Historical Tables* tbls. 1.2 & 15.2 (2011 data), http://www.whitehouse.gov/omb/budget/Historicals.

> sidy to nonprofit civic welfare organizations * * *.

Regan v. *Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983) (footnote omitted);[6] *see also Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 n.29 (1983) (categorizing a tax exemption as involving "public support" for the exempt institution). This means that, under the government's theory, Congress could require that all tax-exempt nonprofits adopt a policy explicitly supporting, say, abortion or contraception. After all, the government could argue, much as it does in this case, that,

> Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. Private entities that do not wish to comply with those conditions may avoid them simply by declining federal funds. * * * [The tax exempt entities] have been given a voluntary choice: whether to assist in carrying out a comprehensive governmental [charitable assistance] strategy that, among other things, aims to [reduce the need for public services by preventing unplanned births]. Offering private entities that type of choice does not violate the First Amendment.

Gov't Br. 11. And the government could argue, as it also does in this case, that such a "funding condition" is not "aimed at suppressing dangerous ideas or dis-

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[6] *Amici* question this understanding of the charitable deduction, but for purposes of this brief what matters is that this Court has endorsed this understanding.

favored viewpoints" and thus is not "subject to heightened scrutiny." *Id.* at 13. The condition requiring express support for contraception or abortion would, after all, just "enlist private entities in communicating a governmental message." *Id.*

Governments also distribute funds in more direct ways, such as through government-subsidized student grants and loans. This Court has held that there is no "substantive difference between direct institutional assistance and aid received by a school through its students." *See Grove City College* v. *Bell*, 465 U.S. 555, 564 (1984); *id.* at 560 n.6, 561 n.8, 568 (noting that loans were treated the same as grants by the Department of Education for Title IX purposes).

Say then that Congress amends Title VI of the Civil Rights Act to bar discrimination based on sexual orientation by universities that indirectly receive student loan funds or GI Bill funds. Under the government's theory, Congress could then require that all universities receiving such funds publicly express support for the equal moral propriety of homosexual conduct and heterosexual conduct. There too, after all, the government could say that the universities "have been given a voluntary choice: whether to assist in carrying out a comprehensive governmental [educational] strategy that, among other things, aims to [reduce hostility towards homosexuals]." Gov't Br. 11.

Likewise, under the government's theory, research grants could be conditioned on the grantee's willingness to adopt policies favored by the grant-giving government. If the federal government wants to influence public attitudes about assisted suicide, it could require that medical research grant recipients

adopt a policy supporting the practice, under the theory that such mandated advocacy is part of a "comprehensive governmental [health care] strategy." *Id.* If a state government wants to influence public attitudes about the death penalty, it could require that recipients of state research grants investigating crime control strategies adopt a policy supporting the death penalty.

And these conditions would be permissible regardless of whether the grant was itself focused on research into assisted suicide or the death penalty. In any of these situations, the grant could be seen as simply "designed * * * to enlist private entities in communicating a governmental message," so long as the message bears some relation to the government's "comprehensive" strategy. *Id.* at 11, 13.

Indeed, the government's brief states that it does not matter whether "only some recipients" of government grants will "implement[] federally funded projects" that are themselves focused on the topics covered by the policy (in this hypothetical, assisted suicide or the death penalty). *Id.* at 27. It is enough, according to the government, that the grant-making agency "saw a value in having all recipients, whatever their particular focus, have [such] a policy" and "reasonably believed that if all program participants] adopt [such] policies," "they will together advance [the government's] goal with consistency, force, and scope." *Id.* at 27-28. Under the government's reasoning, then, every participant in virtually any government program could be required to expressly state its endorsement of whatever viewpoints the government prescribes.

The power to impose such conditions is inconsistent with the Free Speech Clause because, among other things, it would badly damage the marketplace of ideas. Churches, religious universities, religious social services institutions, and other similar organizations are crucial components of civil society. They are key institutional counterweights to the government's tremendous power to shape citizens' moral or political opinions.

Yet this Court's adoption of the government's view would allow governments to commandeer or stifle these rival voices. The government's assertion that groups that are unwilling to accede to the government's demands could "simply" forgo participating in the government program ignores the actual effect of the power the government seeks to arrogate to itself.

First, many institutions, facing the possibility that they would suddenly be deprived of access to government funding or tax exemptions, may bend to the government's wishes and endorse the government's views. Such endorsement may well represent not the institutions' true views but simply what the government has successfully pressured them to say. To the public, however, it would appear from these endorsements as though many organizations—including ones whose history, expertise, or perspective makes them appear especially credible—sincerely share the government's views, when in reality the apparent diversity of supporting voices is merely a government-induced echo chamber. The government would thus have skewed the marketplace of ideas by making its own policies seem more widely accepted than they actually are. Pluralism would give way to conformity.

Second, many other institutions—especially religious ones—would refuse to bow to the government's threats, though it means giving up equal access to student loan and grant funds, property and income tax exemptions, the tax deductibility of charitable contributions, and more. As a result, some of these institutions may have to close their doors because of the huge competitive advantage the government has given to rivals who either agree with the government-prescribed statement or in any event feel themselves willing to pledge loyalty to it. The dissenting institutions' voices would thus be lost to public debate.

And whatever institutions might survive without equal access to government funding would become smaller and less able to carry out their respective missions. Fewer students would go to universities that do not take student loans. Fewer people would donate to religious charities that do not provide a charitable tax deduction. Even congregants who are committed to donating to their churches might not be able to afford to donate as much without the charitable tax deduction. These institutions' voices, even if not entirely silenced, would therefore become on average much less audible, especially in comparison to the now much louder voice of the government and those who agree with it.

For government officials, this might all seem very good. Institutions that are willing to comply with a government's demands would parrot the government's views and would thrive financially. Institutions that refuse to go along with the government would weaken or disappear. And the government's power, already vastly greater than it has been in past eras of American life, would become greater still. Yet for the nation, the results would be dire.

To be sure, as the majority below noted, the government is entitled to hire groups specifically for the purpose of conveying a particular message. *See* Pet. App. 32a (government can offer funds for speech if "the government's program *is*, in effect, its message"). A public university, for instance, could pay student groups specifically to come up with "Buy War Bonds" posters or "Use Contraceptives" campaigns. In these circumstances, the student group's decision would be much more likely to be truly voluntary, because it would be paid directly (and only) for what it would be asked to say.

But it cannot follow that a public university could insist that all recognized student organizations—even those that seek access to school facilities or financial support only on the same terms as other student organizations—pledge to support the war effort or endorse the propriety of contraception. The university must lack this power even if the university (or the state legislature) thinks that helping protect national security or increasing contraceptive use will advance the university's mission.

The government's power to pay for speech that it wishes to promote should be confined to specific payments for such speech, not turned into an unlimited power to demand that all participants in government programs publicly endorse a government-imposed orthodoxy. Yet that unlimited power is the logical outcome of the government's position here.

II. The power claimed by the government would let it impermissibly penalize organizations for exercising their right not to endorse the government's ideology

The power that the government seeks in this case would do more than skew the marketplace of ideas—it would impermissibly penalize organizations for exercising their First Amendment right not to speak in support of the government's ideology, and also constrict their right to speak as they see fit outside the context of the government program.

The Religion Clauses offer a helpful analogy here. As a plurality of this Court reasoned in *Mitchell* v. *Helms*, this Court's "decisions * * * have prohibited governments from discriminating in the distribution of public benefits based upon religious status." 530 U.S. 793, 828 (2000). See also *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). Excluding people from government programs because they or their pursuits are religious would thus usually violate the Religion Clauses. By parity of reasoning, it violates the Free Speech Clause to exclude institutions from participating in programs because of their refusal to endorse the government's ideological positions.

Governments, of course, can impose conditions on grant recipients that *restrict* what the recipients can say or do within the government program. *See, e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 192-200 (1991). But the potential influence of such conditions on free ex-

pression is limited, because the speaker can still say what it wishes on its own time and its own dime. *Id.* at 198-99; *Taxation With Representation*, 461 U.S. at 545; *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 400 (1984). Such speakers "are not being denied [access to a program] because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets." *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959).

Many religious institutions can therefore in good conscience participate in various government programs that *limit* what can be said within the programs, because those institutions can still express their views outside the programs. Programs such as those approved in *Rust* and *Taxation With Representation* let organizations participate without compromising their ability to exercise their Free Speech Clause rights through alternative means.

But if the government *compels* an organization to say things—even if only through an affiliate—as a condition of participating in the program, then the organization cannot avoid expressing views that it may consider immoral or false. It has no alternative means to exercise its Free Speech Clause right *not* to speak while still participating in the program.

The government's suggestion (Gov't Br. 14) that objecting organizations create an affiliate cannot help institutions that have a moral objection to the viewpoint that the affiliate is told to express in order to receive the funding. Consider a church that opposes abortion, and a government program that requires that all participants have a policy of endorsing abortion rights. The church can no more participate in the

program through an affiliate than it can directly. The church's religious beliefs bar *any* of its branches from expressing support for abortion.

We expect our religious and educational institutions to operate with integrity—to say only what they actually believe. Indeed, the law requires that religious beliefs be sincere to garner First Amendment protection. *See, e.g.*, *Frazee* v. *Illinois Dept. of Emp't Sec.*, 489 U.S. 829, 833 (1989). An institution can usually maintain its integrity when it must remain silent about some matters within one of its programs, so long as it can speak about such things outside that program. Silence does not imply assent. Yet an institution cannot maintain its integrity when it is pressured to say what it does not believe, even if it says that in only one part of its organization.

And for this reason, a condition that requires program participants to endorse the government's viewpoint effectively strips participants even of their ability to express their true, contrary views outside that program. Any such expression, after all, would brand the organization as a hypocrite for using different legal personas to speak out of both sides of its mouth. Thus, contrary to the government's view, the Leadership Act's "affiliation guidelines" fall far short of "obviat[ing] any conceivable constitutional difficulty." Gov't Br. 14.[7]

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[7] To the extent the affiliates are sufficiently distinct from one another as to avoid this problem, all the government will have succeeded in doing is creating two entities that both suffer constitutional injury—one that is deprived of access to the government program because of its unwillingness to compromise its

These concerns help explain why, in *Rust*, the majority took pains to stress that "[n]othing in the [regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." 500 U.S. at 200. The government's approach in this case would eviscerate that limitation: it would indeed require program participants to represent as their own—whether through the main organization or a daughter organization—opinions that they do not in fact hold. This power to require dishonesty as a condition of participation in virtually any government program cannot be squared with the Free Speech Clause.

Most religious organizations (and presumably most conscience-based organizations of all sorts) adhere to the view famously urged by Alexander Solzhenitsyn: "Live not by lies"—refuse to endorse in any way those beliefs that you hold to be false.[8] Each person, Solzhenitsyn argued, must resolve never to "write, sign or print in any way a single phrase which in his opinion distorts the truth," never to "take into hand nor raise into the air a poster or slogan which he does not completely accept," and never to "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth." Solzhenitsyn said this to his fellow Russians, but many religious organizations believe that God imposes the same command

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principles, and a second that sacrifices its right to be free from speech coercion as the price of enjoying the benefits offered by the government.

[8] Alexander Solzhenitsyn, *Live Not by Lies*, WASH. POST, Feb. 18, 1974, at A26, *reprinted at* http://www.washingtonpost.com/wp-dyn/content/article/2008/08/04/AR2008080401822.html.

on them, and presumably many nonbelievers also think that this is what their consciences dictate.

Institutions that resolve to "live not by lies" therefore cannot "cabin the effects of [a requirement to endorse a government policy] to the scope of the federally funded programs at issue" simply by pushing the policy requirement off to an affiliate. Gov't Br. 14, 46. The government's proposal in this case is thus an interference with the Free Speech Clause rights of religious institutions far greater than anything this Court has ever approved.

CONCLUSION

For these reasons, requirements that participants in government programs endorse government-supplied messages should be held to violate the Free Speech Clause. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. Cato has an interest in this case because the law at issue significantly burdens political speech and activity, the constitutional protection of which lies at the very heart of the First Amendment.

SUMMARY OF ARGUMENT

This Court has consistently held that Congress may not condition the receipt of federal funds or other public benefits on the relinquishment of First Amendment rights. There is no dispute that when Congress chooses to fund a program, it may impose limitations to ensure that federal funds are used only for that program. There is likewise no dispute that when Congress funds private parties to deliver a message for the government, it may ensure that its message is delivered accurately. This Court, however, has repeatedly held that Congress may not impose conditions on funding that prevent a person

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1. No counsel for any party has authored this brief in whole or in part. No person other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief.

from exercising First Amendment rights outside the program being funded.

In this case, Petitioners seek to rely on Congress's powers under the Spending Clause to expand the scope of the conditions that Congress may impose. They argue that *South Dakota v. Dole*, 483 U.S. 203 (1987), applied a deferential standard of review to conditions imposed under the Spending Clause. Yet *Dole* addressed the structural limits on federal intrusion into the prerogatives of the States. It did not involve the First Amendment at all. While Congress's ability to impose funding conditions on the States is not unlimited, it is patently broader than the government's authority to bargain with citizens for waivers of their First Amendment rights. Were Petitioners' position accepted, it would eviscerate the unconstitutional conditions doctrine, which the Court has long recognized to prevent conditioning federal benefits on the waiver of such fundamental rights.

Congress imposed an unconstitutional condition on receiving funding under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act") when it required organizations receiving Leadership Act funding to adopt "a policy explicitly opposing prostitution," what the parties to this case term the "Policy Requirement." *See* 22 U.S.C. § 7631(f). The Policy Requirement does not purport to limit how an organization uses federal funds, and it does not ask the recipient to speak for the federal government. By its terms, the Policy Requirement operates on an organization-wide basis, even if the organization conducts programs not funded under the Leadership Act, even if the organization does not engage in activities that deal with prostitutes or prostitution at all, and even though

funding recipients are independently barred from using any federal funds to promote prostitution. The Policy Requirement thus exceeds the scope of speech-burdening conditions that Congress may place on funding recipients. The decision of the Court of Appeals should be affirmed.

ARGUMENT

I. Congress Has Limited Authority To Burden First Amendment Rights as a Condition of Receiving Funding

A fundamental First Amendment principle is that the government may not achieve indirectly what it is forbidden to do directly. *Elrod v. Burns*, 427 U.S. 347, 359 (1976); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Thus, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see Rumsfeld v. Forum For Academic & Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006) ("'[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'"(quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 210 (2003)) (additional citations omitted)). "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry*, 408 U.S. at 597.

The Court has recognized that these limitations do not prevent Congress from deciding which private programs it wishes to fund under the Spending Clause. Congress

may "selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Congress is "entitled to define the limits of that program" and may impose conditions ensuring that program funds are not used for an unauthorized purpose. *Id.* at 194.

Congress's ability to control the use of federal funds may prevent those funds from being used for speech at cross purposes with Congress's intent. Thus, *Rust* held that Congress could prohibit recipients of family planning funds from counseling abortion because "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196. In reaching this conclusion, the Court noted that:

> The regulations govern the scope of the Title X *project*'s activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.

Id. (emphasis in original). Thus, *Rust* merely validated restrictions ensuring that government funds were not spent on a type of family planning that Congress had chosen not to fund.

The same principle also can apply to categories of speech, such as lobbying. In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Court upheld the denial of tax deductions under Section 501(c)(3) of the Internal Revenue Code to organizations engaged in "substantial lobbying." Noting that "[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system[,]" the Court observed that "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non-profit organizations undertake to promote the public welfare." *Id.* at 544. Because Taxation With Representation could use a dual-entity corporate structure, with a separate 501(c)(4) tax-exempt entity free to conduct any lobbying activity, the restriction on lobbying by the 501(c)(3) entity merely ensured that tax-deductible contributions were not used to subsidize lobbying activity that Congress did not wish to subsidize. *Id.* at 544-45.

Similarly, in *United States v. American Library Association*, 539 U.S. 194 (2003), the Court held that Congress could require libraries to block Internet access to obscene or pornographic materials as a condition of receiving federal funds for Internet access. A plurality of the Court opined that this restriction did not impose an unconstitutional condition because Congress could choose to subsidize filtered Internet access, so as to ensure that federal funds provided access to materials of "requisite and appropriate quality for educational and information purposes." *Id.* at 212 (plurality opinion).

In contrast, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court struck down a condition that

went beyond merely restricting the use of congressionally appropriated funds, and instead "barred [a grantee] from using even wholly private funds to finance its editorial activity." *Id.* at 400. Because there was no way for the stations to segregate federally funded programs from purely private activity, the funding condition improperly extended beyond merely ensuring the proper use of federal funds. *Id.*

In addition, the Court has recognized that Congress may ensure that "'[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.'" *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (*quoting Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)). Where a program merely funds speech, however, and not a government message, this principle does not apply. Thus, in *Velazquez*, the Court struck down restrictions on funding for the Legal Services Corporation that sought to prohibit its lawyers from making arguments challenging the validity of laws. The Court held that Congress's decision to fund speech in the form of legal representation did not give it the right to control the lawyers' message.

Consistent with the incorporation of the First Amendment, the Court has consistently applied these principles to state and local government conditions as well. For example, in *Speiser*, the Court invalidated a California law that conditioned the receipt of tax benefits on executing a loyalty oath. The Court distinguished earlier cases upholding loyalty oaths for public employees because those cases

> concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

Speiser, 357 U.S. at 527. In contrast, the California statute served no such purpose, and merely sought to suppress a type of speech that the legislature had deemed undesirable.

Perry and *Elrod* also involved efforts to discourage the exercise of First Amendment rights, rather than to ensure that government funds were used for their intended purpose. In *Perry*, the Court held that a public college violated a non-tenured professor's free speech rights if, as alleged, it refused to renew his contract after he criticized the college's administration. *Perry*, 408 U.S. at 597–98. The Court held that the professor had stated a First Amendment claim because reprisals for exercises of speech rights are not a legitimate basis for refusing to renew such an employment contract. *Id.* Similarly, in *Elrod*, five justices agreed that non-policymaking employees who are satisfactorily performing their jobs cannot be discharged solely because of their political beliefs. *Elrod*, 427 U.S. at 373 (plurality op.); *id.* at 375 (Stewart, J. concurring).

These cases make clear that Congress may decide what programs it wants to fund, what programs it does not want to fund, and how those programs should be

carried out. It cannot, however, impose conditions that go beyond the scope of the federal funds. The fact that a person may voluntarily choose not to accept federal funding is not enough to save the restriction from First Amendment scrutiny.

Amicus American Center for Law and Justice attempts to distinguish this line of cases by distinguishing between "generally available public benefits" and the "imposition of eligibility criteria in a discretionary program affecting a small, voluntary pool of applicants." Br. 7–8. Yet the text of the First Amendment admits of no such distinction, and no such principle can be derived from the Court's holdings. All government largesse—from tax breaks to subsidies to the creation of government jobs—ultimately can be described as "discretionary" and "voluntary." No matter whether the speech-burdening condition applies to a generally available public benefit, or to a smaller group, the proper First Amendment question remains the relationship between the condition and the program, not arbitrary factors such as the number of applicants affected or how "discretionary" a court deems a program to be.

In short, this Court's precedents make clear that Congress may not condition participation in a federal program on speech limitations that are outside the scope of the program being funded.

The Court of Appeals observed a "tension between the breadth of Congress's spending power on the one hand and the principle that a condition on the receipt of federal funds may not infringe upon the recipient's First Amendment rights on the other." *Alliance for Open Society Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011). *Amicus* respectfully submits

that the fundamental distinction between a permissible exercise of the Congress's spending power and an impermissible infringement of First Amendment rights is whether the condition ensures that funding is used for an intended and appropriate purpose. When Congress or other government entities have sought to impose speech-burdening conditions that go beyond ensuring that funds are not used for an unauthorized purpose, or beyond ensuring that funds are used properly (such as by delivering an ungarbled government message), the Court has consistently struck those conditions down.

II. Congress Does Not Have Authority Under the Spending Clause To Seek the Relinquishment of Constitutional Rights

Petitioners assert that the Spending Clause, as interpreted in *Dole*, gives the government "wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives." Pet'rs' Br. 17. Petitioners overread *Dole*, which addressed Congress's power to condition federal funding on a state's agreement to enact preferred federal policies. While even that power has its limits, *see National Federation of Independent Business v. Sibelius*, 132 S. Ct. 2566, 2603–07 (2012), *Dole* is a case about the appropriate boundaries of federalism and the implicit boundaries on federal power. *Dole* says nothing about the express restrictions on congressional power found in the First Amendment, much less Congress's power to condition federal benefits upon private citizens' agreement to surrender those rights.

In *Dole*, the Court held that Congress could condition five percent of federal highway funds on a state's adoption of a uniform drinking age. 483 U.S. at 211. The question

presented was whether Congress could use its power under the Spending Clause to regulate an area that the Twenty-First Amendment expressly conferred upon the States. The question was not whether Congress could condition the receipt of federal funding on the receipt of waivers of citizens' First Amendment rights. *See id.* at 205. In other words, *Dole* considered how far Congress could go in using the Spending Clause to expand federal regulatory authority. *Dole* did not consider whether Congress might use the federal treasury to impair express constitutional limitations on governmental power, limitations that apply to state and federal governments alike.

Although the Court stated that "constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly," *id.* at 209, the Court relied on *United States v. Butler*, 297 U.S. 1 (1936), as authority. Like *Dole*, *Butler* was an enumerated powers case, and the Court *struck down* the Agricultural Adjustment Act as exceeding Congress's power under the Spending Clause because the statute did not further a purpose entrusted to the national government. Nothing in *Butler* suggested that Congress has greater authority under the Spending Clause to induce waivers of constitutional rights than under its other enumerated powers, or greater authority than the States have in connection with their spending powers.

Simply put, Petitioners place more weight on *Dole* than it can reasonably bear. Indeed, their interpretation of *Dole* would gut the unconstitutional conditions doctrine. Were it correct, Congress would be free to barter with citizens for waivers of their constitutional rights, so

long as Congress defines the exchange to be in service of a program objective. Yet the Court has rejected such attempts to avoid the unconstitutional conditions doctrine, recognizing that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez*, 531 U.S. at 547–48.

Petitioners' application of *Dole* would remove any effective limit on Congress's power to impose rights-burdening conditions on benefits because Congress could simply define the otherwise unconstitutional objective as a "broad policy objective." For example, given that Congress has found condom usage to be an effective tool for preventing the spread of HIV/AIDS, 22 U.S.C. § 7601(35), then there would be no principled reason why Congress could not impose a policy requirement mandating that funding recipients adopt a policy condemning any organization, or even any church, that opposes birth control. Similarly, in the Affordable Care Act, Congress identified a national "policy objective" in expanding healthcare coverage. *See, e.g.*, 42 U.S.C. § 18091(2)(C). Under Petitioners' logic, Congress could promote such an objective by conditioning doctors' receipt of federal Medicaid funds on their voicing support for the Affordable Care Act.

The Court has never before given Congress carte blanche to adopt such patent violations of the First Amendment. There is no reason to do so now. Instead, the Court should adhere to the principle that Congress's power to condition funding is limited to ensuring that its funds are used to properly implement the program that Congress wishes to fund, not to compel private

organizations to adopt express "policies" that do not involve the use of those federal funds.

III. The Policy Requirement Imposes an Unconstitutional Condition on the Receipt of Leadership Act Funding

The Policy Requirement is an unconstitutional condition because it burdens First Amendment rights to a far greater degree than the Spending Clause can possibly justify. This is true for several reasons.

First, the Policy Requirement is not necessary to ensure that government funds are used only for the program Congress is funding because participating organizations are independently barred from using Leadership Act funds "to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). Moreover, the government employs numerous constitutionally appropriate methods of ensuring that Leadership Act funds are properly spent, including audit requirements, 22 C.F.R. 226.26, and performance reports, 22 C.F.R. 226.51. *See* J.A. 92 (conditioning award on "be[ing] administered in accordance with the terms and conditions as set forth in 22 CFR 226" and in certain documents attached to the award letter). Unlike *Rust*, where Congress had prohibited the use of federal funds to suggest abortion as a family planning technique, and unlike *Regan*, where Congress had prohibited the use of tax-deductible funds to pay for lobbying, the Leadership Act both contains a prohibition on using funds to advocate for prostitution *and* a requirement that recipients affirmatively adopt a policy statement condemning prostitution. Because funding recipients are separately and effectively constrained in their use of federal funds,

the Policy Requirement does not serve the purpose cited in *Rust* and *Regan* of ensuring that funds are used only for their intended purpose.

Second, the Policy Requirement applies organization-wide, rather than within the scope of the HIV/AIDS program that Congress is funding. This distinction is critical because the Court focused in *Rust* on the fact that the restrictions on abortion counseling were limited to "the Title X *project*'s activities" and did not purport to affect "the Title X *grantee*" outside the scope of the project. *Rust*, 500 U.S. at 196–97 (emphasis in original). Although the Court has held that an entity-wide restriction on speech may be acceptable where an organization can separate into two related entities—one that advocates its preferred message, and one that remains silent to avoid spending federal funds—these cases are based on the premise that this structure allows the organization to achieve its First Amendment goals. *See Regan*, 461 U.S. at 552. Here, however, Respondents do not seek to advocate in favor of prostitution, but rather not to speak on the issue at all. *See, e.g.*, J.A. at 164 ("Pathfinder has been forced to stake out a policy position on an issue on which it wished to remain neutral at this time."). It is a hollow remedy to allow an organization to create a silent affiliate when the organization is required to speak and express a message that it does not wish to convey in the first place.

Third, the Policy Requirement is overbroad because it applies even where an organization is not seeking to address HIV/AIDS in prostitutes. The Leadership Act authorizes the use of funds to combat HIV/AIDS through a laundry list of methods, ranging from prevention to treatment. *See* 22 U.S.C. § 7631(b)(1) (appropriating funds

for purposes set forth in 22 U.S.C. § 2151b–2). None of those methods requires organizations to target HIV/AIDS in prostitutes; indeed, prostitution is not even mentioned in Section 2151b–2.[2] Where the Court has upheld conditions burdening First Amendment rights, those restrictions have been directly relevant to the ensuring that the government's program is not muddled together with a funding recipient's non-program objectives. Thus, the government can ensure that its message is clear, *Velazquez*, 531 U.S. at 542, or that non-program advocacy does not occur. *Rust*, 500 U.S. at 196–97. The Policy Requirement sweeps beyond these permissible purposes by requiring anti-prostitution speech even if a given Leadership Act program is designed to target some aspect of combating HIV/AIDS other than combating prostitution.

Fourth, the Policy Requirement affirmatively compels non-governmental speech by organizations that receive aid. This is private speech compelled under the program. Respondents are obliged to express the government's preferred policy on prostitution, even though no federal funds are used to make the speech and the organization might otherwise have no occasion to address the subject. This Court's precedents permitting the government to compel private speech are narrow indeed, and upholding

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2. AOSI, for example, tries to reduce HIV/AIDS by reducing injection drug use. *Alliance for Open Society Int'l, Inc.*, 651 F.3d at 224. While some injection drug users may be prostitutes, the vector being targeted is injection drug use—which Congress specifically authorized as a type of program to be funded through the Leadership Act. 22 U.S.C. § 2151b–2(d)(1)(I) ("Assistance ... shall, to the maximum extent practicable, be used to carry out the following activities: ... assistance to help avoid substance abuse and intravenous drug use that can lead to HIV infection[.]").

the requirements under these circumstances would simply be unprecedented.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

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AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,
Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY
INTERNATIONAL, INC., *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan, bicameral group of nine current and former United States Senators and Members of the United States House of Representatives who were instrumental in the development, drafting, and passage of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 (the "Act"), 22 U.S.C. §§ 7601 *et seq.*, and/or the reauthorization of the Act in 2008. *Amici* have a strong interest in ensuring that this Court has accurate information regarding Congress's objectives and intent in enacting and reauthorizing the Act, including the provision at issue in this litigation – 22 U.S.C. § 7631(f) (the "Policy Requirement").

Michael B. Enzi has been a Republican Senator since 1997. Since joining the Senate, he has been a member of the Senate Health, Education, Labor and Pensions ("HELP") Committee, serving as its Chairman from 2005 to 2007 and its Ranking Minority Member from 2008 to 2012. He has been a leader in moving the United States forward in its battle against HIV/AIDS globally. In his positions on the HELP Committee and the Senate Committee on Foreign Relations, Senator Enzi played a key role in the passage of the 2003 Act and its 2008 reauthorization.

Patrick Leahy has been a Democratic Senator since 1974 and currently serves as Chairman of the Senate Judiciary Committee and the Senate Appropriations Committee Subcommittee on State, Foreign Operations, and Related Programs, which oversees

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[1] Counsel for *Amici* authored this brief in its entirety. No person or entity other than *Amici* and their counsel made monetary contributions to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

programs that are funded pursuant to the Act. When the Act was under consideration in 2003, Senator Leahy spoke on the Senate Floor about the need for private organizations to reach out to and work directly with commercial sex workers as part of an effective HIV/AIDS-fighting strategy and the Policy Requirement's potential adverse impact on such outreach efforts.

Thomas A. Daschle was a Democratic Senator from 1987 to 2005, the Senate Majority Leader from 2001 to 2003, and the Senate Minority Leader from 1995 to 2001 and 2003 to 2005. Senator Daschle played an integral role in the effort to pass the Act in the Senate. Since leaving Congress, Senator Daschle has continued to distinguish himself as a leader and expert on domestic and global health issues. In 2012, he was named a Co-Chair of the International Advisory Board of the Center for the Church and Global AIDS.

William H. Frist, M.D., a nationally recognized heart and lung transplant surgeon, was a Republican Senator from 1995 to 2007 and the Senate Majority Leader from 2003 to 2007. Senator Frist was one of the leaders of the conception, development, and passage of the Act in the Senate. He spoke on the Senate floor in 2003 in support of the Act and the need to support organizations that work directly with sex workers as part of an effective HIV/AIDS prevention strategy. Senator Frist's longstanding dedication to HIV/AIDS and other global health issues has continued since his departure from the Senate.

Barbara Lee is a Democratic Member of the House of Representatives. Since becoming a member in 1998, Congresswoman Lee has established herself as one of the most committed leaders in the fight against HIV/AIDS. She has authored or co-authored

every major piece of legislation dealing with global HIV/AIDS issues since she was elected to Congress, including the Act.

Nita M. Lowey has been a Democratic Member of the House of Representatives since 1989, and is the Ranking Democratic Member of the House Appropriations Committee and its Subcommittee on State, Foreign Operations, and Related Programs, which oversees programs funded under the Act. Congresswoman Lowey was Chair of the Subcommittee on State, Foreign Operations, and Related Programs in 2008, when the reauthorization of the Act was passed. Congresswoman Lowey has been and remains a strong advocate for global health and development, including the United States' global efforts to save the lives of people affected by HIV/AIDS and other deadly diseases.

Henry A. Waxman is a Democratic Member of the House of Representatives. During his more than 35 years as a House Member, Congressman Waxman has been a leader on HIV/AIDS and other health care issues, sponsoring numerous health bills that have been enacted into law. In 2008, Congressman Waxman spoke about the harms caused by application of the Policy Requirement.

Howard L. Berman was a Democratic Member of the House of Representatives from 1983 to 2013. In 2003, Congressman Berman was a member of the House Committee on Foreign Affairs, from which the Act arose. At that time, he spoke on the House floor about the potential for the Policy Requirement to impede the provision of assistance to women engaged in prostitution. Congressman Berman also served as Chairman of the House Committee on Foreign Affairs from 2008 to 2011, and the 2008 reauthorization of

the Act arose from that Committee during his tenure as Chairman.

James Kolbe was a Republican Member of the House of Representatives from 1985 to 2007. During his final six years in the House, Congressman Kolbe was the Chairman of the House Appropriations Committee Subcommittee on Foreign Operations, Export Financing, and Related Programs (now known as the Subcommittee on State, Foreign Operations, and Related Programs), which oversees programs that are funded pursuant to the Act. He is a recipient of the George Marshall Award for Distinguished Service from the United States Agency for International Development.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question before this Court is whether § 7631(f) of the Act, which requires organizations to have a policy explicitly opposing prostitution in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment. In briefing this question, Petitioners have mischaracterized the Policy Requirement in two fundamental respects. In this brief, *Amici* respond to and correct Petitioners' incorrect characterizations of the Act's language and Congress's intent.

First, Petitioners misconstrue a requirement that private organizations communicate a certification or pledge solely to the government as a requirement that they convey a government message to third parties. But the Act clearly distinguishes between these two types of requirements, and does so precisely to ensure that the Policy Requirement does *not* use private organizations to convey a government message explicitly opposing prostitution.

Second, Petitioners incorrectly characterize the Policy Requirement as one of multiple discretionary, subjective criteria that the government may consider in deciding how to allocate competitive funding. But it is evident from the text of the Policy Requirement, the Act's implementing regulations, and written funding opportunity announcements issued by the agency primarily responsible for making funding decisions that the Policy Requirement is a determinative, objective condition of disbursement of funds to an applicant that already has completed the competitive evaluation process and been selected to receive a funding grant.

Petitioners' mischaracterizations of the Policy Requirement reflect a deeper lack of appreciation of the life-saving objectives that Congress sought to accomplish with the Act, and the strategy that Congress deliberately chose to accomplish those objectives. In 2003, Congress found that: (1) "HIV/AIDS has assumed pandemic proportions, spreading . . . to all corners of the world, and leaving an unprecedented path of death and devastation"; (2) "more than 65,000,000 individuals worldwide have been infected with HIV," and "more than 25,000,000 of these individuals have lost their lives"; and (3) HIV/AIDS "threatens personal security," "undermines the economic security of a country and individual businesses," "destabilizes communities," "weakens the defenses of countries," and "poses a serious security issue for the international community." 22 U.S.C. § 7601(1), (2), (6)-(10). Recognizing that this "crisis demands a comprehensive, long-term, international response," *id.* § 7601(21), Congress passed and the President signed the Act in order to "launch[]" the "largest, single upfront commitment in history for an international public health initiative involving a spe-

cific disease." *Remarks on Signing the United States Leadership Act Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, 1 Pub. Papers 541, 541 (May 27, 2003), *available at* http://2001-2009.state.gov/p/af/rls/74868.htm. The Act commits "unprecedented resources" to this "lifesaving" initiative – $15 billion between 2003 and 2008, and an additional $48 billion between 2008 and 2013. *Id.* at 543-44; 22 U.S.C. § 7671(a).

As stated in the Act, its purpose is to "strengthen and enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics and other related and preventable infectious diseases as part of the overall United States health and development agenda" through a comprehensive strategy that includes: (1) "develop[ing] safe and effective vaccines, microbicides, and other prevention and treatment technologies"; (2) "improv[ing] diagnostic capabilities"; (3) supporting "prevention, treatment, and care programs"; (4) "expanding public-private sector partnerships" with non-governmental agencies, which Congress recognized "have proven effective in combating the HIV/AIDS pandemic"; and (5) "improving harmonization of United States efforts with national strategies of partner governments and other public and private entities." 22 U.S.C. §§ 7601(18), 7603(1)(B), (3)(C), (4), (5)(A)-(B).

Congress determined that the Act's HIV/AIDS "prevention" strategy should "make the reduction of HIV/AIDS behavioral risks," including prostitution, "a priority." 22 U.S.C. § 7611(a)(12). However, Congress justifiably decided that the strategy for accomplishing this goal should *not* include using private organizations to convey a government message explicitly opposing prostitution because such a message

would be likely to (1) alienate host nations, potential partner organizations, and individuals in this high-risk group, and therefore (2) impede the outreach and collaboration that are necessary to accomplish the Act's objectives of "treatment," "care," "prevention," "expanding public-private partnerships," and "harmonization" with "partner governments" and entities. Instead, Congress decided that the most effective way to address prostitution and other high-risk behaviors, except those involving violence or coercion, was through various types of education and counseling. *See, e.g.*, *id.* § 7611(a)(12)(A), (B), (C), (F), & (H) (strategy to reduce "behavioral risks" includes "educating men and boys about the risks of procuring sex commercially," "encouraging . . . use of male and female condoms," and "promot[ing] alternative livelihoods . . . for commercial sex workers"). *Compare id.* § 7611(a)(12)(I) & (J) (requiring "cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating such crimes," and "working to eliminate rape, gender-based violence, [and] sexual assault"). Congress also recognized that implementation of its chosen strategy of education and counseling would include efforts by some organizations to reach out to and work directly with commercial sex workers. *See, e.g.*, 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Leahy) ("we need to . . . support . . . organizations" that "work directly with commercial sex workers . . . to educate them about HIV/AIDS, to counsel them to get tested," and "to provide them with condoms"); *id.* (statement of Sen. Frist, responding to Sen. Leahy) ("I agree that these organizations . . . play an important role" and "[w]e need to support the[m]").

This does not mean that Congress intended to promote or encourage prostitution. To the contrary, the Act provides that "[n]o funds made available" under the Act "may be used to promote or advocate the legalization or practice of prostitution." 22 U.S.C. § 7631(e). Rather, the strategy that Congress chose reflects Congress's determination that, absent violence or coercion, conveying a government message explicitly opposing prostitution is not an effective way to address that high-risk behavior and could disserve the Act's HIV/AIDS-fighting purpose.

Consistent with this determination, Congress deliberately crafted the Policy Requirement so that it would *not* use funding recipients to convey a government message explicitly opposing prostitution. The Policy Requirement obligates each recipient, as a condition of receiving funds, to pledge to the government that it has a "policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f). As Petitioner has emphasized, recipients are not required to disclose this pledge to anyone else. Pet. Br. at 27. The Act's legislative history shows that Congress fashioned the Policy Requirement this way precisely to avoid the harms that could result from using recipients to convey a message explicitly opposing prostitution. The Policy Requirement thus contrasts sharply with other provisions of the Act that *do* require the conveyance of government messages about other topics. *See, e.g.*, 22 U.S.C. § 7611(h) ("each program receiving funds under this chapter" must "prominently display[]" a "message" that "the program is a commitment by citizens of the United States to the global fight against HIV/AIDS" and "is an effort on behalf of the citizens of the United States").

Petitioners have taken the position that the Policy Requirement does not violate the First Amendment

because, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 833 (1995) (citing *Rust v. Sullivan*, 500 U.S. 173, 196-200 (1991)). *See* Pet. Br. at 31-33. Petitioners also have argued that the Policy Requirement is permissible under this Court's decision in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), because "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id.* at 587-88. *See* Pet. Br. at 13, 40. Both of these positions are incorrect. Because Congress never intended to use funding recipients to convey a government message explicitly opposing prostitution, the Policy Requirement cannot accurately be characterized as a "governmental message" provision. Congress also did not intend the Policy Requirement to be one of multiple discretionary, subjective "criteria" considered in order to "allocate competitive funding"; rather, it chose to make the Policy Requirement an express, objective condition of any disbursement of funds to recipients that already have been selected. Because both of Petitioners' characterizations of the Policy Requirement are at odds with the Act's text and Congress's expressed intent, neither characterization should be used as a basis for a decision regarding the Policy Requirement's constitutionality.

ARGUMENT

I. THE ACT'S HIV/AIDS-FIGHTING STRATEGY DOES NOT INCLUDE USING FUNDING RECIPIENTS TO CONVEY A GOVERNMENT MESSAGE OPPOSING PROSTITUTION.

Petitioners contend that the Policy Requirement should be upheld because "the government" is "disburs[ing] public funds" under the Act "to private entities to convey a governmental message" explicitly opposing prostitution. *Rosenberger*, 515 U.S. at 833; Pet. Br. at 31-33. This contention reflects a fundamental misunderstanding of the Act. The HIV/AIDS-fighting strategy chosen by Congress and reflected in the Act does not include using funding recipients to convey a government message explicitly opposing prostitution. Rather, the Act entails a comprehensive set of hands-on strategies to prevent transmission of HIV/AIDS and to provide treatment and care for individuals and communities affected by the disease. To the extent the Act addresses prostitution at all, it reflects Congress's selection of education and counseling as the tools for doing so. Consistent with this choice, Congress purposely crafted the Policy Requirement so that it would *not* use funding recipients to convey a message explicitly opposing prostitution.

A. The Act Reflects Congress's Selection Of Education And Counseling Rather Than Condemnation To Address Prostitution.

Congress determined that one aspect of the Act's wide-ranging HIV/AIDS "prevention" strategy would be to "make the reduction of HIV/AIDS behavioral risks a priority," and that the most effective way to accomplish this reduction was through various types of education and counseling, including: (1) "educat-

ing men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; (2) "encouraging the correct and consistent use of male and female condoms"; (3) "supporting comprehensive programs to promote alternative livelihoods, safety, and social reintegration strategies for commercial sex workers and their families"; (4) "promoting the delay of sexual debut and the reduction of multiple concurrent sexual partners"; and (5) "promoting abstinence from sexual activity and encouraging monogamy and faithfulness." 22 U.S.C. § 7611(a)(12)(A), (B), (C), (F), & (H). Although these education and counseling strategies include "encouraging" and "promoting" lower-risk behaviors and lifestyles, they do not include conveying a message explicitly opposing prostitution. *See, e.g.* Pet. Br. at 26 ("Congress therefore directed that *educational efforts* concentrate on 'specific populations that represent a particularly high risk of contracting or spreading HIV/AIDS . . . .'") (emphasis added).

There is a compelling justification for this approach. Congress understood that an effective HIV/AIDS-fighting strategy requires not only collaboration with foreign governments and organizations, but also efforts by certain organizations to reach out to and work directly with commercial sex workers. As emphasized during the 2003 Congressional debates:

> There are organizations who work directly with commercial sex workers and women who have been the victims of trafficking, to educate them about HIV/AIDS, to counsel them to get tested, to help them escape if they are being held against their will, and to provide them with condoms to protect themselves from infection. This work is not easy. It can also be dangerous. It

> requires a relationship of trust between the organizations and the women who need protection.
>
> . . . [W]e need to be able to support these organizations.

149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Leahy). *See also id.* (statement of Sen. Frist, responding to Sen. Leahy) ("I agree that these organizations who work with prostitutes and women who are the victims of trafficking play an important role in preventing the spread of HIV/AIDS. We need to support these organizations . . . ."). A policy explicitly opposing prostitution is likely to impede that collaboration and outreach by: (1) offending host nations, organizations, and groups that funding recipients seek to influence and help; (2) deterring funding recipients from providing (or even discussing) effective treatment or prevention programs for individuals in this high-risk group; (3) causing those individuals to feel stigmatized, and therefore deterring them from taking advantage of any treatment and prevention programs that are available. *See, e.g.*, CAJA 882, 884 ¶¶ 23, 26; CAJA 847-48 ¶ 25; 154 Cong. Rec. H7120 (daily ed. July 24, 2008) (statement of Rep. Waxman) (Policy Requirement "has reportedly had the unintended consequence of scaring grantees away from doing effective outreach programs for sex workers").

At the same time, Congress understood that education and counseling are not sufficient to address sex "trafficking" and certain other types of violence and coercion because "[v]ictims of coercive sexual encounters do not get to make choices about their sexual activities." 22 U.S.C. § 7601(23). Thus, the Act requires (1) "promoting cooperation with law enforcement to prosecute offenders of trafficking, rape, and sexual assault crimes with the goal of eliminating

such crimes," and (2) "working to eliminate rape, gender-based violence, sexual assault, and the sexual assault of women and children." *Id.* § 7611(a)(12)(I) & (J). However, the Act does not require such efforts to "prosecute" or "eliminate" prostitution that does not involve violence or coercion. To the contrary, when it reauthorized the Act in 2008, Congress *removed* a provision that explicitly made "eradicating prostitution" part of the Act's strategy for "the reduction of HIV/AIDS behavioral risks." *Id.* § 7611(a)(4) (2004). *See also* 154 Cong. Rec. S1742 (daily ed. Mar. 7, 2008) (statement of Sen. Biden) (2008 amendments to Act "make[] important adjustments based on lessons learned over the past 5 years"); *Various Bills and Resolutions – Markup Before the H. Comm. on Foreign Affairs*, Serial No. 110-158, 110th Cong. 206-07 (2008) ("Feb. 27, 2008 Markup") (statement of Rep. Berman) ("We also have 5 years of experience under our belts. We know what works and what does not."). By making this change, Congress confirmed its intent to use education and counseling to address prostitution not involving violence or coercion.

The Act also includes a Congressional finding that:

> Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the Unites States to eradicate such practices. The sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic. One in nine South Africans is living with AIDS, and sexual assault is rampant, at a victimization rate of one in three women. Meanwhile in Cambodia, as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast

> Asia. Victims of coercive sexual encounters do not get to make choices about their sexual activities.

22 U.S.C. § 7601(23). Petitioners rely heavily on the first sentence of this finding, which is one of forty-one findings contained in Section 7601, to support their claim that the Policy Requirement is intended to convey a government message explicitly opposing all prostitution. Pet. Br. at 26. However, read as a whole, the finding makes clear that it addresses prostitution in the contexts of sex "trafficking," "sexual violence," and "coercive sexual encounters." Moreover, the finding does not require recipients to convey any message or take any action; nor does it prescribe *how* prostitution should be addressed. Rather, those prescriptions are contained in other provisions of the Act, including Section 7611. As explained above, those provisions reflect Congress's choice of education and counseling as the tools to address prostitution.

B. Congress Purposely Crafted The Policy Requirement So That It Would *Not* Use Funding Recipients To Convey A Government Message Opposing Prostitution.

The Act contains only one provision requiring that any "message" be conveyed on behalf of the United States government. That provision, entitled "Message," requires "[t]he Global AIDS Coordinator" to "develop a *message*, to be *prominently displayed* by each program receiving funds under this chapter" that "the program is a commitment by citizens of the United States to the global fight against HIV/AIDS" and "is an effort on behalf of the citizens of the United States." 22 U.S.C. § 7611(h) (emphases added). Section 7611(h) demonstrates that, where Congress intended to convey a government message regarding

programs or activities funded under the Act, it made that intent clear with an explicit provision in the Act.

The Policy Requirement is fundamentally different from Section 7611(h)'s "message" provision. It obligates each recipient, as a condition of receiving funds under the Act, *to assure the government* that it "ha[s] a policy explicitly opposing prostitution." 22 U.S.C. § 7631(f); Pet. Br. at 44 ("By signing the award documents and accepting federal funds pursuant to those agreements, recipients thereby 'agree that they are opposed to the practices of prostitution . . . .'"). But it does *not* require the recipient to disclose this "policy" to anyone but the government. Pet. Br. at 22, 27, 43 n.6. This is consistent with the descriptions of the Policy Requirement by its author and others in Congress. *See, e.g.*, 154 Cong. Rec. H7116 (daily ed. July 24, 2008) (statement of Rep. Smith) ("[t]he legislation before us also retains the antiprostitution/sex trafficking *pledge*") (emphasis added); 154 Cong. Rec. H1906 (daily ed. Apr. 2, 2008) (statement of Rep. Ros-Lehtinen) (USAID "has implemented [the Policy Requirement] by requiring that any group that receives funding sign a *pledge affirming* its opposition to" prostitution and sex trafficking) (emphasis added). As these descriptions confirm, the Policy Requirement compels each funding recipient to "pledge" *to* the government that the recipient adopts the government's viewpoint, but does not compel any recipient to convey that viewpoint in a message *on behalf of the government* to others.

Moreover, the Act's legislative history confirms that Congress deliberately crafted the Policy Requirement this way to *avoid* using recipients to convey a government message explicitly opposing prostitution. During the 2003 Congressional debates, concerns were raised that the Policy Requirement could be

perceived as "condemn[ing] the behavior" of commercial sex workers, and therefore "could impede" the "effectiveness" of efforts to "work directly with" people in that high-risk group. 149 Cong. Rec. S6457 (daily ed. May 15, 2003) (statement of Sen. Leahy). To accommodate the "need to support . . . organizations" that "work with prostitutes," while at the same time not "condon[ing] . . . prostitution or sex trafficking," Congress concluded that "the answer" was "to include a statement in the contract or grant agreement between the U.S. Government and such organization that the organization is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women." *Id.* (statement of Sen. Frist, responding to Sen. Leahy).

II. THE POLICY REQUIREMENT IS NOT ONE OF MULTIPLE DISCRETIONARY, SUBJECTIVE CRITERIA USED TO ALLOCATE COMPETITIVE FUNDING.

Petitioners also argue that the Policy Requirement is valid under this Court's decision in *Finley* because "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." 524 U.S. at 587-88. *See* Pet. Br. at 13, 40. This, too, is a fundamental mischaracterization of Policy Requirement's language and Congress's intent. Congress knows how to craft statutes that "allocate competitive funding" according to discretionary, subjective criteria when it wishes to do so. But that is not how Congress crafted the Policy Requirement. Instead, Congress chose to make the Policy Requirement an objective and determinative condition of funding. Because of this Congressional choice, the

Policy Requirement cannot properly be characterized as the type of provision that was at issue in *Finley*.

This Court in *Finley* upheld a 1990 amendment to the National Foundation on the Arts and the Humanities Act of 1965, 20 U.S.C. §§ 951 *et seq.*, that required the National Endowment of the Arts ("NEA") to "'tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public'" in evaluating the "'artistic excellence and artistic merit'" of applications for funding. 524 U.S. at 572 (quoting 20 U.S.C. § 954(d)(1)). In doing so, this Court emphasized that the provision "d[id] not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application." *Id.* at 580-81; *see also id.* at 581 ("§ 954(d)(1) imposes no categorical requirement"). Instead, the statute specified "decency and respect" only as "consideration[s]" to be taken into account by the NEA as part of the "competitive process according to which the grants are allocated." *Id.* at 586. Moreover, these "consideration[s]" were "subjective" factors "susceptible to multiple interpretations," which meant that "one could hardly anticipate how [they] would bear on" particular grant applications. *Id.* at 583. These characteristics, this Court concluded, provided reassurance that the provision will not "inevitably . . . be utilized as a tool for invidious discrimination" among viewpoints or to "effectively preclude or punish the expression of particular views." *Id.* at 582-83. *See also, e.g.*, *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003) (plurality opinion) (heightened scrutiny inapplicable to libraries' discretionary consideration of content "in making collection decisions"); *id.* at 216-17 (Breyer, J., concurring in the

judgment) (strict scrutiny unnecessary for library's exercise of "discretion necessary to create, maintain, or select [its] 'collection'").

Finley has no application here because Congress chose to craft the Policy Requirement in a way that is fundamentally different from the statute at issue there. The criteria that the Department of Health and Human Services ("HHS") uses to evaluate funding applications under the Act are specified in written funding opportunity announcements ("FOAs") issued by HHS. *See, e.g.*, HHS, Agency Funding Opportunity No. CDC-RFA-GH13-1309, *Increasing HIV/AIDS Program Capacity through Human Resources Capacity Building to Support the Transition of the Kenya HIV Program to Local Organizations under the President's Emergency Plan for AIDS Relief (PEPFAR)*, (Feb. 27, 2013) ("Kenya FOA"), *available at* http://www.grants.gov/search/search.do?mode=VIEW&oppId=217813 (follow "full announcement" hyperlink, then follow either full announcement option). The criteria are: (1) "Ability to Carry Out the Proposal"; (2) "Technical and Programmatic Approach"; (3) "Capacity Building"; (4) "Monitoring and Evaluation"; (5) "Understanding of the Problem"; (6) "Personnel"; (7) "Administration and Management"; (8) "Budget . . . and Budget Narrative"; and (9) "Funding Preferences." *Id.* at 45-49. Application of these criteria requires inherently subjective determinations. Although the FOA specifies the weight that HHS gives to each criterion (*id.*), nothing in the FOA, the applicable regulations, or the text of the Act states that any criterion is determinative or otherwise constrains HHS's discretion regarding how to interpret or apply any of the criteria.

But Congress did not make the Policy Requirement simply one of multiple discretionary, subjective crite-

ria that the HHS *could* consider in evaluating funding applications. Instead, Congress made the Policy Requirement a determinative, objective condition of disbursement of funds to an applicant that already has completed the competitive evaluation process and been selected to receive a grant. Moreover, Congress did not give HHS or any other agency charged with implementing the Act any discretion regarding whether to apply or how much weight to give the Policy Requirement. This is evident from the language of the Policy Requirement, HHS's regulations, and the FOAs. *See* 22 U.S.C. § 7631(f) ("No funds made available to carry out this chapter . . . may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking . . . ."); 45 C.F.R. § 89.1(b) (Policy Requirement "shall also be included in the award documents for any grant, cooperative agreement or other funding instrument involving Leadership Act HIV/AIDS funds entered into with the recipient"); Kenya FOA at 41 ("certifications" of compliance with Policy Requirement "are prerequisites to the payment of any U.S. Government funds"); *id.* (compliance "is an express term and condition of receiving U.S. Government funds").

This distinction between a discretionary, subjective criterion and a determinative, objective condition is one of multiple reasons that the Policy Requirement should not be upheld under this Court's decision in *Finley*. Because the Policy Requirement falls into the latter of these two categories, it is susceptible to being "utilized as a tool for invidious discrimination" among viewpoints or to "effectively preclude or punish the expression of particular views." 524 U.S. at 582-83. Indeed, the Policy Requirement's author in Congress emphasized that its purpose was to require

that recipient organizations explicitly adopt the government's favored viewpoint. *See, e.g., United States Leadership Against AIDS/HIV, Tuberculosis, and Malaria Act of 2003 – Markup Before the H. Comm. on International Relations*, Serial No. 108-33, 108th Cong. 149 (2003) (statement of Rep. Smith) ("The issue that is before us today is whether or not we will provide money to organizations that seek the legalization of prostitution . . . ."); Feb. 27, 2008 Markup at 252 (statement of Rep. Smith) ("we do not want NGOs that support . . . prostitution . . . to be getting this money"). For this reason alone, the Policy Requirement bears no meaningful resemblance to the provision at issue in *Finley*.

Moreover, in *Finley*, the government sought to apply viewpoint-discriminatory criteria only in its selection of which specific art *projects* it wished to fund. Here, in contrast, the government seeks to control the viewpoints, speech, and activities of *grantee organizations in their entirety* – including viewpoints, speech, and activities that are outside the scope of any program for which the grantees are receiving federal funds.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that, in resolving this case, this Court should not adopt Petitioners' incorrect characterization of the Policy Requirement as either (1) a "governmental message" provision, or (2) one of multiple discretionary, subjective "criteria" that are considered in order to "allocate competitive funding."

Respectfully submitted,

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RECORD AND BRIEFS

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AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

—v.—

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* COALITION AGAINST TRAFFICKING IN WOMEN, EQUALITY NOW, ET AL., IN SUPPORT OF REVERSAL

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Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 651 F.3d 218 (2012) 4

Statutes:

22 U.S.C. § 2151b-2(d)(3)(A) 32

22 U.S.C. § 7101(b)(2) 6

22 U.S.C. § 7101(b)(4) 6

22 U.S.C. § 7601 *et seq.* 1

22 U.S.C. § 7631(e) 31, 34

22 U.S.C. § 7631(f) 1, 31, 32, 34, 37

Rules:

Supreme Court Rule 37 1

Supreme Court Rule 37.6 1

Supreme Court Rule 37.3(a) 1

Other Authorities:

About Us, Apne Aap, http://apneaap.org/index.php (last visited March 3, 2013) ... 28

AIDS stalks imported sex slaves, South China Morning Post, Nov. 10, 2003 15

Anonymous, *Stories, in Sold Out: A Recovery Guide for Prostitutes Anonymous* (J.L. Williams ed., 1991) 13

PAGE

Brief for the American Humanist Ass'n. et al. as Amici Curiae in Support of Plaintiff-Appellees, *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218 (2010) 35

Brottsbalken [BrB] [Criminal Code] 6:8 (Swed.) 23

Hannah Carrigg, *Prostitution Regimes in the Netherlands and Sweden: Their Impact on the Trafficking of Women and Children in Illicit Sex Industries*, Monitor: J. Int'l Stud., Fall 2008 19

Vednita Carter, *Providing Services to African-American Prostituted Women*, 2 J. Trauma Prac. 213 (2003) 27

Peter Cluskey, *Abuse, Misery and Criminality Behind the Legal Sex Trade*, Irish Times, Mar. 17, 2012, http://www.irishtimes.com/newspaper/world/2012/0317/1224313471972.html 19

Comm. on the Elimination of Discrimination Against Women, 11th Sess., 1992, General Recommend. No. 19, U.N. Doc. A/47/38 (1992) 11

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317 (IV), U.N. Doc. A/1164 (Dec. 2, 1949) 5

PAGE

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 71 29

Complaint, *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. et al.*, 435 F. Supp 2d 5 (D.D.C. 2005) (No. 05-01604) 36

Expert Group Meeting on Prevention of Violence Against Women and Girls, UN Women in Coop. with ESCAP, UNDP, UNFPA, UNICEF, and WHO, Sept. 17-20, 2012 ... 24

Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. Trauma Prac. 33 (2003) ..... *passim*

Melissa Farley, *'Bad For the Body, Bad for the Heart': Prostitution Harms Women Even if Legalized or Decriminalized*, 10 Violence Against Women 1087 (2004) 14, 20, 21, 35

Wendy Freed, *From Duty to Despair: Brothel Prostitution in Cambodia*, 2 J. Trauma Prac. 133 (2003) 10

Evelina Giobbe, *Prostitution: Buying the Right To Rape, in Rape and Sexual Assault III: A Research Handbook* (Ann Wolbert Burgess ed., 1991) 13

Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012) 24

PAGE

Cecilie Hoigard & Liv Finstad, *Backstreets: Prostitution, Money and Love* (1986)..... 13

Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 Mich. J. Gender & L. 91 (1993)..... 12

H. Patricia Hynes & Janice G. Raymond, *Put in Harm's Way: The Neglected Health Consequences of Sex Trafficking in the United States, in Policing the National Body: Sex, Race, and Criminalization* 197 (2002)..... 17

Sheila Jeffreys, *The Legalisation of Prostitution: A Failed Social Experiment*, Women's Health Watch Newsletter (Sandra Coney, ed. 2003), *available at* http://www.womens-health.org.nz/the-legalisation-of-prostitution-a-failed-social-experiment.html 18, 22

Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* (2009)..... 5

Nicholas D. Kristof, *Do as He Said*, N.Y. Times, Mar. 13, 2008, http://www.nytimes.com/2008/03/13/opinion/13kristof.html?_r=0 .....14, 15

Dorchen A. Leidholdt, *Prostitution and Trafficking in Women: An Intimate Relationship*, 2 J. Trauma Prac. 167 (2003).....*passim*

PAGE

Bebe Loff, Cheryl Overs & Paulo Longo, *Can Health Programmes Lead to Mistreatment of Sex Workers?*, 361 Lancet 1982 (2003) 17

Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 Mich. J. Gender & L. 13 (1993) 11

Press Release, U.N. Dep't of Pub. Info., New Global Treaty To Combat Sex Slavery of Women and Girls, U.N. Doc. DPI/2098 (Feb. 2000) 11

Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) 6, 29, 30

Protocol To Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Dec. 15, 2000, 2237 U.N.T.S. 319 6

Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. Trauma Prac. 315 (2003) 19

Janice G. Raymond et al., Sex Trafficking of Women in the United States: International and Domestic Trends (March 2001) (unpublished report), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf 15, 21

PAGE

Colin A. Ross, Melissa Farley & Harvey L. Schwartz, *Dissociation Among Women in Prostitution*, 2 J. Trauma Prac. 199 (2003) 13

Marlise Simons, *Amsterdam Tries Upscale Fix for Red-Light District Crime*, New York Times, Feb. 24, 2008, http://www.nytimes.com/2008/02/24/world/europe/24amsterdam.html?pagewanted=print&_r=0 20

Sweden's Prostitution Solution: Why Hasn't Anyone Tried This Before?, Women's Justice Center, http://justicewomen.com/cj_sweden.html (last visited March 3, 2013) 23

Swedish Institute, *The Ban Against the Purchase of Sexual Services: An Evaluation 1999-2008* (2010), *available at* http://www.government.se/download/6dfbbdbd.pdf?major=1&minor=151488&cn=attachmentDuplicator_0_attachment 23

The Network of Sex Work Projects, *Taking the Pledge: the USAID PEPFAR Clause, Sex Work, & HIV Prevention*, Youtube, http://blip.tv/sexworkerspresent/taking-the-pledge-185356 16

UNDP, UNFPA & UNAIDS, *Sex Work and the Law in Asia and the Pacific* (2012)... 24

PAGE

U.N. Population Fund, *The State of World Population* 2006 (2000), *available at* http://www.unfpa.org/webdav/site/global/shared/documents/publications/2000/swp2000_eng.pdf 12

USAID, *Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as Amended – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking*, Acquisition & Assistance Policy Directive 05-04, Amendment 3 (Apr. 13, 2010) 33

U.S. Dep't of State, *Trafficking in Persons Report 2008* (2008), *available at* http://www.state.gov/documents/organization/105501.pdf 8, 21

U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011* (2011) 29

U.S. Man's Porn Sales Helping Fight AIDS Overseas, Associated Press, Oct. 10, 2005, http://ww1.aegis.org/news/ap/2005/AP051016.html 36

Ine Vanwesenbeeck et al., *Professional HIV Risk Taking, Levels of Victimization, and Well-Being in Female Prostitutes in the Netherlands*, 24 Archives Sexual Behav. 503 (1995) 12

INTEREST OF THE *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Coalition Against Trafficking in Women, Equality Now, and forty-four more organizations, respectfully submit this brief as *amici curiae* supporting reversal of the decision below.*

Amici are nongovernmental organizations, many led by survivors of prostitution and trafficking, which provide HIV/AIDS prevention services and other assistance to women, men, and children in prostitution. *Amici* can attest with firsthand knowledge to the violence and coercion endemic in the sex-for-money industry—legalized or illegal—where sexual exploitation and sexual assault lead to the rampant transmission of HIV/AIDS.

In this case, the Second Circuit affirmed a preliminary injunction against enforcing 22 U.S.C. § 7631(f), a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), 22 U.S.C. § 7601 *et seq*. That provision imposes a requirement on organizations seeking federal funding for HIV/AIDS programs under the Act: having or adopting a policy explicitly opposing prostitution and sex trafficking. In light of the vulnerable populations they serve, and the importance of combating HIV and AIDS in those populations, *amici*

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* Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to fund the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

have a direct and substantial interest in whether the provision is constitutional.

Amici subscribing to this brief are forty-six organizations and individuals:[1]

1. Abolish Slavery;
2. Aboriginal Women's Action Network;
3. A Call To Men;
4. Apne Aap;
5. Associazione Degli Africani in Piemonte
6. Association IROKO;
7. ASOMUPCAR;
8. Bangladesh National Women Lawyers Association;
9. Bangladesh Society for the Enforcement of Human Rights;
10. Bilateral Safety Corridor Coalition;
11. Breaking Free;
12. Buklod Center
13. CATWALAC Mercosur
14. Coalition Against Trafficking in Women;
15. Coalition Against Trafficking in Women and Girl in Latin America and the Caribbean;
16. Coalition Against Trafficking in Women, Asia-Pacific
17. Coalition Against Trafficking in Women Australia;
18. Courtney's House;
19. Defensoras Populares;
20. Embrace Dignity;
21. Equality Now;
22. Fundación CEDAI;

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[1] A description of the *amici* can be found in Appendix A to this brief.

23. Hagamos el Camino para una Vida Mejor;
24. Hunt Alternatives Fund;
25. Instituto De Estudios De La Mujer "Norma Virginia Guirola De Herrera";
26. Interamerican Platform of Human Rights, Argentinean Chapter;
27. Kvinnefronten (Women's Front);
28. Mediterranean Network Against Trafficking in Women;
29. MensWork;
30. Minnesota Indian Women's Resource Center;
31. Minnesota Men's Action Network: Alliance to Prevent Sexual and Domestic Violence;
32. Ms. Bridget Perrier;
33. Ms. Sigma Huda, Former United Nations Special Rappatour on Human Trafficking;
34. Mujeres Transformando el Mundo;
35. National Women's Coalition Against Violence & Exploitation;
36. Oficina Jurídica para la Mujer;
37. Prostitution Research & Education;
38. Restore NYC;
39. Roks, the National Organization for Women's Shelters and Young Women's Shelters in Sweden;
40. Sex Trafficking Survivors United;
41. Sextrade 101;
42. Stigamot;
43. The E.V.A. Center;
44. The Miramed Institute;
45. Trafficking in America Task Force; and
46. Veronica's Voice

SUMMARY OF THE ARGUMENT

Congress has determined that the eradication of HIV/AIDS can only be achieved by abolishing its root causes. Congress found, and *amici* agree, that two of the key drivers of HIV/AIDS are prostitution and sex-trafficking, which rapidly and tragically spread the disease among unknowing and powerless victims.

Despite this, the Court of Appeals for the Second Circuit observed that the "stated purpose of the Leadership Act is to fight HIV/AIDS, . . . and Defendants cannot now recast the Leadership Act's global HIV/AIDS-prevention program as an anti-prostitution messaging campaign."[2]

The Court of Appeals' sweeping refusal to recognize the most obvious linkage between preventing HIV/AIDS and eradicating prostitution and sex trafficking is incomprehensible. The Second Circuit, like Respondents and *amici* in support of Respondents in the lower courts, did not even mention sex trafficking in its summary description of Congress's policy.[3] Moreover, its summary description of a policy opposed to sex trafficking and prostitution as merely "an anti-prostitution messaging campaign" reveals a fundamental misunderstanding of the gravity of the human-rights abuses at stake, and their impact on the HIV/AIDS pandemic. It is an unfortunate testament to the success of the sex industry in de-sensitizing society to the blatant degradation and

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[2] *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 237-38 (2012).

[3] *See id.*

adverse health consequences that result from selling and purchasing people, mostly women and children in conditions of poverty, for sex. Prostitution has been branded inevitable; the world's oldest profession. On the contrary, prostitution, which most often takes the form of sex trafficking, is the world's oldest oppression, one that "endanger[s] the welfare of the individual, the family and the community . . . ."[4]

Of all of the grave harms resulting from purchasing people for sexual exploitation, nothing could be more manifestly obvious than the risk of contracting a sexually-transmitted disease. It is therefore very difficult to understand how the Second Circuit arrived at its conclusion that adding a condition to oppose one of the root causes of HIV/AIDS was "re-casting" the policy with an entirely different purpose.

HIV/AIDS is rampant among victims of prostitution and sex trafficking in regions where so-called sex tourism is prevalent. Thai Police Lieutenant Colonel Suchai Chindavanich agrees, explaining that, "'[t]he main concern of the [Thai] government is that prostitution should not be a long-term occupation, because this leads to the spread of HIV and other crimes.'"[5]

The risk of HIV/AIDS exposure faced by victims of prostitution and sex trafficking is closely linked

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[4] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317 (IV), U.N. Doc. A/1164, at preamble (Dec. 2, 1949).

[5] Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Slavery* 67 (2009).

to the other forms of abuse pervading the sex industry: the targeting of victims made vulnerable by myriad factors such as poverty or childhood sexual abuse; the use of violence by pimps, johns,[6] and traffickers to impose their will on prostituted individuals; and the very nature of the commercial sex industry, which is pervaded by sex trafficking, i.e., sexual exploitation induced at minimum by "an abuse of power or a position of vulnerability,"[7] and with great frequency by tactics of force, fraud and/or coercion.[8] By definition, this brutal industry exposes those exploited in it to a wide array of physical and psychological harm.[9]

[6] Individuals who patronize prostituted persons.

[7] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25, art. 3 (Nov. 15, 2000) [hereinafter Palermo Protocol].

[8] Trafficking Victims Protection Act of 2000 § 102(b)2, 22 U.S.C. § 7101(b)(2) (2006).

[9] While *amici* do not conflate prostitution and trafficking and acknowledge that not all individuals in the commercial sex industry are or were under the control of a trafficker, we have learned both from our work on the ground with victims and survivors and from available research, that most individuals in the industry entered as children exploited by adults, as recognized by the Trafficking Victims Protection Act, 22 U.S.C. § 7101(b)(4) (2006); that the vast majority of people in prostitution are induced into it by "the abuse of power or a position of vulnerability," a means of trafficking identified by the Palermo Protocol, *supra* note 7, art. 3, and that once in the commercial sex industry, it is extraordinarily difficult for prostituted people to exit, as the result of addiction, trauma and other psychological injury, and subtle and not so subtle tactics of coercion employed by sex industry profiteers.

Amici respectfully contend that any organization that believes it can help eradicate HIV/AIDS while turning a blind eye to one of the disease's inherent causes is not effectively using U.S. government funds. Rather, it is undermining the very purpose of those funds. Moreover, any organization that blatantly disregards the human rights abuses resulting from purchasing people for sexual exploitation is operating under a paradigm that contravenes international and domestic law.

Amici respectfully but adamantly reject the notion espoused by Respondents that it is impossible to do effective HIV/AIDS-prevention work among prostituted people while condemning the industry in which victims of prostitution are exploited and abused. Programs seeking to reduce the harms of prostitution and sex trafficking are most effective if they uphold basic notions of human rights and dignity; programs that help victims escape commercial sexual exploitation and develop alternative sustainable means of livelihood, as *amici* do with the women, men, and children they serve. Tellingly, escape from prostitution is the outcome that persons in prostitution say they most want.[10] To identify the commercial sex industry as a system of exploitation, discrimination and abuse is not to stigmatize its victims; it is to stand in solidarity with them. To oppose prostitution and sex trafficking means to reject

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[10] *See* Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 J. Trauma Prac. 33, 51 (2003) [hereinafter Farley, *Prostitution and Trafficking*]; Dorchen A. Leidholdt, *Prostitution and Trafficking in Women: An Intimate Relationship*, 2 J. Trauma Prac. 167, 171 (2003).

the notion that vulnerable people should accept as their fate being bought and sold under the euphemism of "sex work,"[11] a term that not surprisingly was originated by the sex industry itself in an effort to legitimize prostitution as a form of work.

Amici do not address the legal arguments in this case but rather the policy contentions that have been placed at issue. *Amici* argue that there are compelling reasons to require that public HIV/AIDS-prevention funds be directed to organizations that conduct harm-reduction efforts with an ultimate view to harm elimination; to help individuals establish the free and practical choice

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[11] In their Complaint in this case filed with the U.S. District Court for the Southern District of New York, Alliance for Open Society International, Inc. and Open Society Institute ("Respondents" here) claimed that the terms "sex work" and "sex worker" are "the terms generally used in the public health and international relief fields." Pls.' Compl. 1. This claim is inaccurate. The phrases "sex work" and "sex worker" are associated with a certain political view concerning prostitution: specifically, the view that prostitution should be considered a form of employment and should be legalized and treated as a job like any other. The term "sex work" usually signals agreement with this point of view and is very far from being "generally used." For example, the United Nations has not used the term in its Conventions, Protocols, and Declarations—not even in its most recent protocol on trafficking, now ratified by almost 100 countries, including the United States. *See* Protocol To Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Dec. 15, 2000, 2237 U.N.T.S. 319. The State Department notes that "[t]erms such as 'child sex worker' are unacceptable because they falsely sanitize the brutality of this exploitation." U.S. Dep't of State, *Trafficking in Persons Report 2008*, at 26 (2008), *available at* http://www.state.gov/documents/organization/105501.pdf.

of a life outside of the sex industry. Organizations that support the notion that persons should be bought and sold for the sexual use and profit of others directly undermine any goal of HIV/AIDS-prevention.

To regard the government's policy against prostitution and sex trafficking as merely incidental to the fundamental purpose of the Leadership Act is to completely disregard both the immense importance of an organization's policy on prostitution and sex trafficking and the Act's clear and unambiguous choice to promote reduction of HIV/AIDS within a framework that explicitly condemns prostitution and sex trafficking as abuses of human rights. The United States has compelling reasons to decide that its funds are better spent on organizations whose approach will, in the long run, be far more effective.

Amici contend that: (A) the prostitution and sex-trafficking industry is inherently harmful; (B) opposing the legalization and legitimization of prostitution lies at the heart of any effective program aimed at eradicating HIV/AIDS; (C) opposition to this exploitation does not require stigmatizing or criminalizing its victims, but recognizes and supports their basic human rights; (D) the Leadership Act requires opposition to the legalization and practice of prostitution and sex trafficking; and (E) the provisions of the Leadership Act were enacted in response to specific abuses documented prior to its enactment.

ARGUMENT

A. Prostitution and sex trafficking are forms of abuse and exploitation.

Prostitution and sex trafficking proliferate the spread of HIV/AIDS as violence, coercion and gender inequality further an environment of sexual abuse and coerced unprotected sex. In that setting, victims of prostitution are at high risk of contracting sexually transmitted diseases.

The harms of prostitution and sex trafficking are so profoundly linked to gender, class, and racial inequality as to make the commercial sex industry one of the world's most extreme systems of discrimination and human rights abuse. Its victims are overwhelmingly female and overwhelmingly poor.[12] They are made vulnerable by the disadvantaged status of women in many regions, by the childhood sexual abuse for which girls are disproportionately targeted, and by the desperation induced by poverty.[13] Once in prostitution, victims' status falls even lower and their life prospects are more sharply curtailed.[14] International sex trafficking and sex tourism have contributed to the already-strong role of racial and ethnic discrimination in prostitution, with men from richer industrialized countries purchasing women from developing or impoverished regions.[15]

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[12] Leidholdt, *supra* note 10, at 171.

[13] *Id.*

[14] *See* Wendy Freed, *From Duty to Despair: Brothel Prostitution in Cambodia*, 2 J. Trauma Prac. 133, 143 (2003).

[15] Leidholdt, *supra* note 10.

Among prostituted women, undocumented women trafficked from poor countries often suffer the greatest exposure to the most harmful and unsafe practices within prostitution.[16] In short, prostitution and sex trafficking are both the cause and effect of cruel and entrenched inequalities: while victims suffer in conditions of poverty, sex traffickers reap handsome rewards, selling, for example, prostituted Asian women and girls in Japan—or the United States—for up to $20,000 each.[17] Indeed, prostitution almost invariably is a form of violence against women that deprives them of human dignity through cruel, degrading, discriminatory and traumatic acts.[18]

Coercion is endemic from the start: violence paves most victims' entry into prostitution, particularly against children. The average newly-recruited prostituted person in the United States is between 13 and 14 years old.[19] By conservative estimates, two million more girls aged five to fifteen are brought into the commercial sex industry

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[16] *Id.*

[17] Press Release, U.N. Dep't of Pub. Info., New Global Treaty To Combat Sex Slavery of Women and Girls, U.N. Doc. DPI/2098 (Feb. 2000).

[18] *See* Comm. on the Elimination of Discrimination Against Women, 11th Sess., 1992, General Recommend. No. 19, ¶¶ 1, 4, 6, 7, 10, 12-16, 24, U.N. Doc. A/47/38 (1992) (recognizing prostitution as a practice of discrimination against women under the Convention Against All Forms of Discrimination Against Women); *see also* Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 Mich. J. Gender & L. 13, 26 (1993).

[19] Farley, *Prostitution and Trafficking*, *supra* note 10, at 35.

each year.[20] Studies of prostituted persons consistently reveal that a majority were sexually abused as children, and that their early abuse facilitated their entry into prostitution.[21]

Once recruited, persons in prostitution typically experience daily violence, including routine physical assault, rapes and beatings—these apart from being used as a sexual object through prostitution and trafficking, which the victim experiences as sexual abuse. In transnational research on the commercial sex industry, including that of the United States, seventy-one percent of people in prostitution had been physically assaulted; sixty-three percent said they had been raped.[22] A study in Portland, Oregon found that prostituted persons were raped once a week on average.[23] Notably, in countries that have legalized prostitution in an effort to reduce its harms, rates of assault and rape against prostituted persons remain extremely high.[24]

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[20] U.N. Population Fund, *The State of World Population* 2006, at 26 (2000), *available at* http://www.unfpa.org/webdav/site/global/shared/documents/publications/2000/swp2000_eng.pdf.

[21] Farley, *Prostitution and Trafficking*, *supra* note 10, at 35.

[22] *Id.* at 33-34, 44.

[23] Susan Kay Hunter, *Prostitution is Cruelty and Abuse to Women and Children*, 1 Mich. J. Gender & L. 91, 92 (1993).

[24] *See generally* Ine Vanwesenbeeck et al., *Professional HIV Risk Taking, Levels of Victimization, and Well-Being in Female Prostitutes in the Netherlands*, 24 Archives Sexual Behav. 503 (1995).

Survivors of the commercial sex industry report that the trauma associated with physical danger is matched by the trauma associated with constant sexual degradation, with having one's body sold and purchased as a commodity. Many survivors have reported that, to cope with the psychological degradation of prostitution, they develop a dissociation response—a sense of splitting off a part of the self, of "leav[ing] my body," of going "someplace else mentally."[25] The aftermath of this coping mechanism is the high incidence of dissociative disorders diagnosed in individuals emerging from prostitution.[26]

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[25] *See, e.g.*, Evelina Giobbe, *Prostitution: Buying the Right To Rape, in Rape and Sexual Assault III: A Research Handbook* 143, 144 (Ann Wolbert Burgess ed., 1991) ("I would numb my feelings. I wouldn't even feel like I was in my body. I would actually leave my body and go somewhere else with my thoughts and with my feelings until he got off, and it was over with. I don't know how else to explain it except that it felt like rape. It was rape to me."); Cecilie Hoigard & Liv Finstad, *Backstreets: Prostitution, Money and Love* 132 (1986) ("Regardless of the variations in the type of prostitution, women feel that they have to rent out the most intimate parts of the body to anonymous strangers to use as a hole to jerk off in. The women try to keep themselves as unharmed as possible from this massive invasion by maintaining a distance from the customer."); Anonymous, *Stories, in Sold Out: A Recovery Guide for Prostitutes Anonymous* (J.L. Williams ed., 1991) ("I would just go someplace else mentally as well as emotionally. Soon I just lost track of days at a time. When I was awake, I started feeling 'invisible.' When I would come back home from a call, I used to stand in front of a mirror and pinch myself just to see if I was real. Spending months with people just looking at your body can make you wonder if 'you' exist at all.")

[26] *See* Colin A. Ross, Melissa Farley & Harvey L. Schwartz, *Dissociation Among Women in Prostitution*, 2 J. Trauma Prac. 199, 209 (2003).

The health consequences for victims of the commercial sex industry are serious, commonly including tuberculosis, sexually transmitted diseases, substance abuse, sleeplessness, depression, cervical cancer, hepatitis, brain injury resulting from head trauma, anxiety disorders, dissociative disorders, infertility, and early mortality.[27]

According to columnist Nicholas Kristof, "[t]he mortality data for prostitute[d] [persons] is staggering."[28] He notes a meticulous study by the Journal of Epidemiology that found that the "workplace homicide rate for prostitutes" is fifty-one times that of the next most dangerous occupation for women: working in a liquor store.[29] The average age of death of the prostituted women in

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[27] *See* Melissa Farley, *'Bad For the Body, Bad for the Heart': Prostitution Harms Women Even if Legalized or Decriminalized*, 10 Violence Against Women 1087, 1097 (2004) [hereinafter Farley, *Prostitution Harms Women*]; Farley, *Prostitution and Trafficking*, *supra* note 10, at 52-53. Prostitution likewise affects mental health. Individuals living in prostitution or emerging from prostitution—mostly female, and mostly young—exhibit symptoms of mental and emotional trauma at levels that are comparable to the mental health injuries sustained by survivors of combat or rape. A 2003 study of 854 people living in or recently emerged from prostitution found that sixty-eight percent of them exhibited post-traumatic stress disorder. Farley, *Prostitution and Trafficking*, *supra* note 10, at 34. This prevalence rate is comparable to rates found among combat veterans seeking treatment, battered women seeking shelter, rape survivors, and survivors of state-sponsored torture. *Id.* at 56.

[28] Nicholas D. Kristof, *Do as He Said*, N.Y. Times, Mar. 13, 2008, http://www.nytimes.com/2008/03/13/opinion/13kristof.html?_r=0.

[29] *Id.*

the study was thirty-four.[30] The conclusion of the study was that "[w]omen engaged in prostitution face the most dangerous occupational environment in the United States."[31]

HIV/AIDS infection is one of the leading causes of death among prostituted persons.[32] The reasons are clear: lack of negotiating power and ongoing sexual violence. Even where no physical coercion is involved, the insistence of johns to not use condoms threatens the safety of prostituted persons.[33] Women in prostitution report that seventy-three percent of men offered to pay more for sex without a condom; and forty-five percent said that they were abused when they insisted that men use condoms.[34]

When this case was before the Second Circuit, the American Humanist Association and the American Civil Liberties Union, among others, submitted an *amicus curiae* brief in support of Respondents Alliance For Open Society International, Inc., and Open Society Institute (the "ACLU brief"). The ACLU brief acknowledged the inherent lack of negotiating power of women

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30 *Id.*

31 *Id.*

32 *See AIDS stalks imported sex slaves*, South China Morning Post, Nov. 10, 2003.

33 *See* Janice G. Raymond et al., Sex Trafficking of Women in the United States: International and Domestic Trends 11, 72, 73, 81, 82 (March 2001) (unpublished report), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf [hereinafter Raymond et al., Report].

34 *Id.* at 11.

sold for sex when they described "*attempts* by sex workers to persuade clients to use condoms . . . ."[35]

Attempting to persuade clients to use condoms is a far cry from the notion espoused by Respondents that prostituted women "are the best educators of their male clients," as described by an official of SANGRAM cited in the ACLU's brief.[36]

In the context of abuse and violence, prostituted persons and children are coerced into unsafe sex, and face the risk of rape or assault on a daily basis.

B. Recognizing and opposing the grave harms of the prostitution industry lies at the heart of any effective program to combat the spread of HIV/AIDS

Contrary to the claims contained in the ACLU brief submitted to the Second Circuit, the U.S. government's decision to solely fund those organizations that oppose prostitution and sex trafficking does not represent an irrational policy choice bound to inflict harm on prostituted victims and trafficked individuals. In fact, *amici*'s extensive experience demonstrates that the policy of opposing prostitution and sex trafficking fosters the organizations' ability to provide effective long-term assistance against the increased risk of

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[35] Brief for the American Humanist Ass'n. et al. as Amici Curiae in Support of Plaintiff-Appellees, *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.* at 20 n.30, 651 F.3d 218 (2010) (emphasis added).

[36] *See id.* at 20 n.30 (citing The Network of Sex Work Projects, *Taking the Pledge: the USAID PEPFAR Clause, Sex Work, & HIV Prevention*, Youtube, http://blip.tv/sexworkerspresent/taking-the-pledge-185356).

HIV/AIDS. In order to work effectively against the harms inflicted by prostitution, including exposure to HIV/AIDS, it is essential to identify the industry of prostitution and sex trafficking for what it is: a global marketplace in which organized criminal entities and other profiteers reap billions annually from the sexual exploitation and enslavement of the most vulnerable women and children in the world, and as a system of abuse, of exploitation, of discrimination, of violence. It is also essential to confirm victims' belief that they are entitled to something better than a life of increasing physical and psychological trauma in sexual servitude and to avoid any appearance of condoning the systematic exploitation perpetrated by pimps and johns. Legalization of prostitution does not stop its harms. Legalization does not mean, for example, that people in prostitution will be spared from unprotected sex. Because buyers are willing to pay more money for sex without condoms, and because women and children in prostitution are under the control of pimps, brothel owners, and other sex industry entrepreneurs, extremely risky sex acts "can always be purchased."[37] Nor can legalization protect prostituted

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[37] Bebe Loff, Cheryl Overs & Paulo Longo, *Can Health Programmes Lead to Mistreatment of Sex Workers?*, 361 Lancet 1982, 1982 (2003); *see also* H. Patricia Hynes & Janice G. Raymond, *Put in Harm's Way: The Neglected Health Consequences of Sex Trafficking in the United States, in Policing the National Body: Sex, Race, and Criminalization* 197, 217 (2002) (discussing the high percentage of sex-industry buyers unwilling to use condoms and willing to pay extra for sex without condoms, the high physical and economic vulnerability of prostituted women and their corresponding low bargaining power regarding condoms, and the high percentage of prostituted women who have experienced condom breakage).

persons from violent attacks by buyers. In an upscale legal brothel in Australia rooms are equipped with panic buttons, but a bouncer reports that the women's calls for help can never be answered quickly enough to prevent violence by johns, which occurs regularly.[38] Indeed, legalization cannot stop any of the other abuses associated with illegal prostitution, such as brutal physical violence against prostituted women and children by pimps, the influence of organized crime in the sex industry, or the trafficking of women and children for purposes of prostitution.

Countries where prostitution has been legalized in an effort to reduce its harms have experienced quite the opposite result: huge growth in the *illegal* sex industry. This is because legalizing prostitution creates a hospitable environment for sex tourists and other buyers, driving up demand for illegal, unregulated prostitution. And there is a corresponding impact on human trafficking. Local women constitute an inadequate "supply," so women and girls are trafficked in to meet the demand. The result is that legalization not only places the imprimatur of the state on the violence and abuse intrinsic to the prostitution industry, but also increases both legal and illegal prostitution.[39]

Following the legalization of prostitution in the Australian state of Victoria, legal brothels prolif-

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[38] Sheila Jeffreys, *The Legalisation of Prostitution: A Failed Social Experiment*, Women's Health Watch Newsletter (Sandra Coney, ed. 2003), *available at* http://www.womens-health.org.nz/the-legalisation-of-prostitution-a-failed-social-experiment.html.

[39] Leidholdt, *supra* note 10, at 167-83.

erated, but *illegal* brothels metastasized by three hundred percent in one year.[40]

Less than a decade after legalizing its brothels, the Dutch government has come to realize that legalization has serious problems. Prostitution was legalized in the Netherlands in 2000, already a one billion dollar industry,[41] with the hopes of making prostitution safer for women. The opposite has occurred. Police are now saying that legalization has made it more difficult to combat human trafficking.[42] Of the thousands of prostituted people in The Netherlands now, some eighty percent are foreign-born, revealing the unwillingness of Dutch women to voluntarily work in prostitution, and seventy percent are undocumented and unlicensed.[43] These undocumented women, the vast majority of prostituted persons in the Netherlands, receive no protection from the much-touted statutory regime in place. They face ongoing violence and abuse while the situation worsens. The mayor of Amsterdam has now publicly stated that "'We realize that this hasn't

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[40] Janice G. Raymond, *Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution*, 2 J. Trauma Prac. 315, 320-21 (2003) [hereinafter Raymond, *Ten Reasons*].

[41] Hannah Carrigg, *Prostitution Regimes in the Netherlands and Sweden: Their Impact on the Trafficking of Women and Children in Illicit Sex Industries*, Monitor: J. Int'l Stud., Fall 2008, at 7-8.

[42] Peter Cluskey, *Abuse, Misery and Criminality Behind the Legal Sex Trade*, Irish Times, Mar. 17, 2012, http://www.irishtimes.com/newspaper/world/2012/0317/1224313471972.html.

[43] Carrigg, *supra* note 41, at 10.

worked, that trafficking in women continues . . . ."[44]

If legalization drives up demand, the only way to prevent a corresponding increase in HIV/AIDS is to ensure safer sex. However the notion that condom distribution is, by itself, sufficient to protect prostituted persons from HIV/AIDS is simply inconsistent with the realities *amici* have confronted in the sex industry. Pimps and sex traffickers commonly employ a range of techniques, ranging from emotional manipulation to vicious physical and sexual violence, in order to control the persons being sold and maximize profits. Unprotected sex is one such technique as prostituted persons do not have the bargaining power to demand consistent use of condoms.[45] Studies consistently demonstrate the ability of customers to demand sex without a condom where the vastly unequal power of a prostituted person means that she or he does not have the physical or economic power to refuse.[46] For example, one study found that eighty-nine percent of Canadian customers of prostituted persons refused condoms.[47]

The success of HIV education to control rates of infection where prostitution has been legalized is

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[44] Marlise Simons, *Amsterdam Tries Upscale Fix for Red-Light District Crime*, New York Times, Feb. 24, 2008, http://www.nytimes.com/2008/02/24/world/europe/24amsterdam.html?pagewanted=print&_r=0.

[45] *See* Farley, *Prostitution Harms Women*, *supra* note 27, at 1110; Leidholdt, *supra* note 10, at 168; Raymond et al., Report, *supra* note 33, at 72-73.

[46] Farley, *Prostitution Harms Women*, *supra* note 27, at 1109-10.

[47] *Id.* at 1110.

also questionable. In Senegal, prostitution is government regulated on the belief that regulated, legalized prostitution will lower rates of HIV. The government requires prostituted women to register themselves. In exchange, they receive monthly check-ups and HIV counselling. Yet in a study comparing rates of HIV in registered women that were educated about HIV, and non-registered women who had not received any HIV education, the rates of HIV infection among registered women was higher.[48]

Where safer sex education is combined with legitimizing prostitution as work, abuses are inevitable. In Kerala State, India, social workers agreed, in exchange for access to the brothels, "to ignore the presence of prostituted children and not to advocate escape from prostitution by informing the women about available services."[49]

Moreover, supporting the growth of the commercial sex industry will only serve to stimulate, facilitate, normalize, and generate profits from sex trafficking, a clearly egregious human rights violation. More than two million children are exploited annually in the global sex trade.[50] The Internet facilitates prostitution for pimps and johns alike. Human trafficking can be conducted via telephone and satellite transmissions. As a result, human traffickers no longer have to travel

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[48] *Id.* at 1112.

[49] *Id.* at 1114.

[50] U.S. Dep't of State, Trafficking in Persons Report 2008, at 26 (2008) available at http://www.state.gov/documents/organization/105501.pdf.

within the United States or abroad to secure the purchase of women and children for sex slavery.

The lived experiences of those subjected to prostitution and sex trafficking reveal a wide array of physical and psychological harms that are interrelated and mutually reinforcing. Violence and harm are not separate problems that exist side-by-side with prostitution; they are intrinsic to the commercial sex industry's very existence. Survivors of prostitution and sex trafficking, including the ones who lead organizations appearing here as *amici*, are well acquainted with this array of harms. These intrinsic aspects of the industry exacerbate another harm: the risk of HIV/AIDS transmission. Legalization, in countries where it has been tried, has not succeeded as a strategy for helping prostituted individuals, or reducing HIV-AIDS.[51]

It is important to note, however, that *amici* are opposed to the imposition of criminal penalties upon prostituted persons, the victims whose bodies are bought and sold. The lack of options that impelled these victims into the sex industry in the first place is worsened, not remedied, by criminal prosecution. Conversely, *amici* are convinced that criminal and other sanctions must be used against the pimps and the buyers who derive profit, fund and perpetuate prostitution. Accountability for those who create the demand for prostitution and sex trafficking is one necessary component of a societal strategy for stopping the spread of the abuse.

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[51] *See* Jeffreys, *supra* note 38.

One approach that has proven effective to oppose prostitution and sex trafficking is the approach taken by the government of Sweden, where criminal penalties do not apply to the persons sold in prostitution but are directed against their pimps and the buyers.[52] The results to date have been salutary. Trafficking into Sweden has dropped by over half to statistically negligible numbers,[53] compared to the estimated 15,000 to 17,000 women and girls trafficked annually into neighboring Finland.[54] No other nation's efforts to combat prostitution and sex trafficking have come even close to Sweden's results: eighty percent of Sweden's people have come to support their country's policy, and the country's police and prosecutors have come to be among the policy's strongest supporters.[55]

Not surprisingly the Swedish approach to trafficking, now referred to as the Nordic model after its adoption by Norway and Iceland, has been criticized by organizations representing sex industry interests and working to legitimize prostitution as a form of work, as well as by the Global Commission on HIV and the Law in a report calling for the repeal of all laws prohibiting the pur-

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52 *See* Brottsbalken [BrB] [Criminal Code] 6:8 (Swed.).

53 Swedish Institute, *The Ban Against the Purchase of Sexual Services: An Evaluation 1999-2008*, at 7, 20 (2010), *available at* http://www.government.se/download/6dfbbdbd.pdf?major=1&minor=151488&cn=attachmentDuplicator_0_attachment.

54 *Sweden's Prostitution Solution: Why Hasn't Anyone Tried This Before?*, Women's Justice Center, http://justice-women.com/cj_sweden.html (last visited March 3, 2013).

55 *Id.*

chase of sex as well as for the decriminalization of brothels.[56] This position is in direct contradiction to the UN Trafficking Protocol and to the positions of the UN Committee on the Elimination of all Forms of Discrimination against Women, and UN Women, which have all called for countries to combat the demand for prostituted sex in order to prevent sex trafficking. In September 2012, the United Nations Women's Expert Group on Prevention of Violence Against Women and Girls issued a report stating:

> In countries that have decriminalized the sale of sexual services, provided comprehensive and rights-based services and justice responses for women in the sex industry who are victims/survivors of violence (and for victims of trafficking), and *criminalized those who purchase sexual services*, evaluations have found that those experiencing violence have better access to justice, redress and services; that there have been attitudinal shifts against the purchase of sex (particularly among young people); and, importantly, that it has significantly reduced sex trafficking and the involvement of organized crime in the sex industry.[57]

Ultimately, the only truly effective way to protect against the harms of the prostitution industry

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[56] Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health* (2012); UNDP, UNFPA & UNAIDS, *Sex Work and the Law in Asia and the Pacific* (2012).

[57] *Expert Group Meeting on Prevention of Violence Against Women and Girls*, UN Women in Coop. with ESCAP, UNDP, UNFPA, UNICEF, and WHO, Sept. 17-20, 2012.

is to assist its victims in getting out. Indeed prostituted people themselves know this. When a survey of 854 prostituted persons in nine countries asked the question "What do you need," the number one response—given by a staggering eighty-nine percent of respondents—was to get out of prostitution.[58]

C. Opposing the "legalization and practice" of prostitution and sex trafficking does not stigmatize persons in prostitution; rather, it affirms their basic dignity and human rights.

Respondents allege in their complaint to the district court that organizations working to combat HIV/AIDS cannot oppose prostitution without stigmatizing and alienating its victims.[59] Nothing could be farther from the truth. For *amici*, the ability to provide prostituted persons with comprehensive services, including HIV/AIDS prevention, is fully compatible with and even dependent on staff members' willingness to acknowledge the full spectrum of harms suffered by those in prostitution, to ally themselves with prostituted persons against those who have abused them, and to collaborate with persons in prostitution on developing the ability to build a life outside of prostitu-

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[58] Farley, *Prostitution and Trafficking, supra* note 10, at 34.

[59] *See, e.g.*, Compl. at 8 ("Both AOSI and OSI have, as their principles of governance, an adherence to the principles of an open society, including opposition to adopting any policy positions that would lead to the stigmatization of socially marginalized groups. Adopting a policy opposing sex work violates this principle.").

tion. This approach is far from "stigmatizing" to the victims of prostitution and reflects a profound opposition to the legalization of prostitution.

Service providers who champion the legalization of prostitution are unlikely to be able to provide the comprehensive services prostituted individuals require because a pro-prostitution policy reflects a fundamental blindness to the realities of the sex industry. In particular, such organizations are unlikely to be cognizant of the crucial fact that the prostitution industry feeds upon and reinforces existing forms of inequality and injustice, including gender inequality. As with other forms of gender-based violence such as domestic violence and rape, it is impossible to provide truly effective services to the victims of the violence without addressing the system of gender-based harm that underlies the injuries suffered by individual victims. Accordingly, organizations that do not recognize the inherent harms of the prostitution industry enumerated in Point A are poorly situated to meet the needs of people as disadvantaged, marginalized, and powerless as the prostituted victims the Leadership Act seeks to reach.

The fact that harm reduction work is most effectively conducted within a program designed to help the victims exit the sex industry is manifest from the work of several organizations that have pledged not to support legalizing prostitution. Breaking Free and Apne Aap are only two of many organizations whose work provides daily proof that it is possible to oppose prostitution without stigmatizing or alienating its victims, the individuals sold in prostitution. They demonstrate that harm reduction work is most effectively conducted

within a program designed to eliminate the harm, not perpetuate it.

Breaking Free is a social service agency that provides comprehensive services to assist women in escaping prostitution. Its offices are in pre-dominantly African-American neighborhoods in St. Paul and Rochester, Minnesota. Half of the staff are survivors of prostitution, as is the organization's founder and executive director.

Breaking Free helps victims of prostitution become survivors, overcoming the trauma of commercial sexual exploitation by providing services that include: education and information regarding HIV/AIDS and other sexually transmitted diseases; emergency provision of food, shelter, and medical care; treatment for drug addiction; education; counseling; family and parenting classes; job training; housing services; and health care. Ingrained in every aspect of these comprehensive services is an organizational commitment to understanding prostitution as a slavery-like form of exploitation for which the exploiters, not the victims, are blameworthy. Far from alienating prostituted women, this commitment creates the basis for a sustained, trusting relationship in which the difficult and painful work of rebuilding a life can take place.[60]

Apne Aap (which means "self help" in Hindi) is a community-based initiative of women in prostitution in India, founded in the red light district of Mumbai in 2002. Twenty-two women in prostitu-

[60] Vednita Carter, *Providing Services to African-American Prostituted Women*, 2 J. Trauma Prac. 213, 217-21(2003).

tion started this organization, with the aim of ending their own exploitation and preventing other women from being exploited through sex trafficking. Apne Aap prevents sex trafficking by building the capacity of girls, women and children in slums and red-light areas to organize in small groups that seek and get access to education, livelihood and legal protection. They support community-based initiatives that assist those trapped by the sex industry, mitigate the harms of prostitution, and prevent inter-generational prostitution.

While considering prostitution to be a form of violence against women, Apne Aap uses a harm-reduction model, providing services in a manner that is nonjudgmental toward, and supportive of, the women in prostitution. Apne Aap community centers provide a safe space for women in prostitution, with free weekly medical check-ups and sexual health awareness programs, as well as literacy classes and vocational training to help women acquire the skills they need to enable them to escape prostitution.[61] Women are not required to leave the sex industry in order to receive services. However, services are integrated with an ongoing commitment to helping women exit prostitution and are firmly grounded in opposing the prostitution industry.

For these groups and others listed as *amici*, opposing prostitution is the essence of what it means to champion the rights of those who have

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[61] *About Us*, Apne Aap, http://apneaap.org/index.php (last visited March 3, 2013).

been disadvantaged, marginalized, and made powerless as a result of prostitution. *Amici* strongly believe that, as with other forms of gender-based violence such as domestic violence and rape, it is impossible to provide truly effective services to the victims of the violence without addressing the system of gender-based harm that underlies the injuries suffered by individual victims.

Those basic human rights are recognized and advanced within the framework of international law, which recognizes that "prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person . . ." regardless of whether the victim "consents" or whether borders are crossed.[62]

Amici consider prostitution an abuse of human rights that is inextricably linked to sex trafficking within the meaning of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime ("Palermo Protocol"),[63] to which the United States is a party.[64]

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[62] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 71, at preamble, art. 1.

[63] Palermo Protocol, *supra* note 7.

[64] U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011*, at 432 (2011).

The Palermo Protocol sets the world standard for sex trafficking, defining it as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. *Exploitation shall include at minimum, the exploitation of the prostitution of others or other forms of sexual exploitation*, . . . slavery or practices similar to slavery . . . .[65]

The Palermo Protocol recognizes that prostitution and trafficking are inextricably linked, that neither legally turns on the non-consent of the victim, and that trafficking is about exploitation by a third party, not movement across jurisdictional lines.

The prostitution industry profits from human trafficking, commercialized sexual exploitation and commercialized rape in contravention of the Palermo Protocol and other universally recognized norms of international law. As a result, *amici* oppose sex trafficking and commercialized sexual exploitation within the framework of international law, and recognize and affirm the basic human rights and dignity of victims of prostitution.

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[65] Palermo Protocol, *supra* note 7, art. 3 (emphasis added).

D. Requiring organizations to have a policy "opposing prostitution and sex trafficking" should be interpreted to require groups to oppose the "legalization and practice" of prostitution and sex trafficking.

The Leadership Act places two restrictions on the distribution of U.S. funding for HIV/AIDS prevention programs. First, "[n]o funds made available to carry out this chapter or any amendment made by this chapter, may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e) (2006). Second, "[n]o funds made available to carry out this chapter, or any amendment made by this chapter, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking . . . ." *Id.* § 7631(f).

Read together, the requirements of Section 7631(e) shed light on the meaning of Section 7631(f); that is, a policy "opposing prostitution and sex trafficking" should be read to require opposition to the "legalization or practice" of prostitution or sex trafficking. Nothing in the Leadership Act suggests that an organization receiving federal funds should stigmatize or criticize the persons who are sold in prostitution. Nor does the Act suggest that organizations must advocate criminalization of these victims.

Amici of Respondents in the court below have argued that Section 7631(f) is effectively a gag order, preventing them from engaging in any work with prostituted persons for fear of losing their

funding. They argue that internationally lauded anti-AIDS programs have lost their funding as a direct result of the policy requirement, naming programs that include HIV prevention initiatives, clinical services for prostituted people; the distribution of condoms; and campaigns to end violence against prostituted persons.[66]

These claims have not been substantiated, and funding could have been lost for a myriad of reasons. However, to the extent that there is any correlation, this is an issue of implementation, not of the requirement itself. Section 7631(f) does not bar providing services to victims of prostitution and sex trafficking. In fact, Congress specifically directed that educational efforts concentrate on high-risk populations, "including those exploited through the sex trade . . . ."[67] Providing health services or condoms to victims of prostitution and sex trafficking is similarly not barred.

Further, it is somewhat incongruous that Respondents basically ignore that the requirement applies to sex trafficking as well as prostitution. Nowhere do Respondents argue their right to educate on best practices for cross-border trafficking safety, or to train trafficked victims on how best to negotiate working conditions with their traffickers.

By explicitly linking opposition to prostitution with opposition to sex trafficking, the Leadership Act refers to practices carried out by those who

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[66] Brief for the American Humanist Ass'n et al., *supra* note 35, at 16-22.

[67] 22 U.S.C. § 2151b-2(d)(3)(A).

exploit others for commercial sex, not to the victims of that exploitation.[68]

Amici are firmly opposed to placing criminal penalties or stigma of any kind upon prostituted persons, those whose bodies are bought and sold. The lack of options that impelled victims of prostitution to enter the sex industry in the first place is worsened, not remedied, by criminal prosecution.

Amici's position in this brief, and our contention that there are sound justifications for the provisions of the Leadership Act, are absolutely conditioned on a finding that Section 7631 does *not* require such stigmatization, criticism, or criminalization.

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[68] Moreover, the USAID policy on prostitution and trafficking sets forth a standard provision for a grant, cooperative agreement, or subagreement, which explicitly approves the use of harm-reduction techniques to assist persons in prostitution. It reads as follows:

> The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons. None of the funds made available under this agreement may be used to promote or advocate the legalization or practice of prostitution or sex trafficking. Nothing in the preceding sentence shall be construed to preclude the provision to individuals of palliative care, treatment, or postexposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

USAID, *Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as Amended - Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking*, Acquisition & Assistance Policy Directive 05-04, Amendment 3 (Apr. 13, 2010).

Amici's combined experience teaches that "opposing prostitution" means extending empathy and assistance to prostituted persons, while requiring accountability for pimps and johns, and decrying—and working to stop—the harmful industry that pimps and johns perpetuate. Accountability for those who create the demand for prostitution and sex trafficking is one necessary component of a societal strategy for stopping sex trafficking and related forms of commercial sexual exploitation. Without demand, *amici* contend, there is no supply.

We believe that the purpose of Section 7631(f) will be best served if the United States clarifies its implementation in a manner that is consistent with the above-stated principles. Moreover, we urge the Court to interpret and apply Section 7631(f) in this light.

E. Sections 7631(e) and (f) were enacted in the wake of specific abuses documented prior to the passage of the Leadership Act.

The requirement of a "policy explicitly opposing prostitution and sex trafficking" was enacted, not in a vacuum, but in the wake of specific abuses by certain organizations that have used HIV/AIDS-prevention funds to support their own efforts to promote legalization of prostitution and acceptance of prostitution as legitimate employment for poor women. The requirement in Section 7631(f) is justified as a way to ensure that HIV/AIDS-prevention funds are used to support programs that distribute condoms and provide health services, while seeking to eliminate prostitution rather than perpetuate it.

A vivid example of such an abuse is an organization in South Africa called SWEAT (Sex Workers Education and Advocacy Taskforce), in which the pro-prostitution "advocates" and the sex industry have been one and the same. SWEAT received funding to do HIV/AIDS-prevention work in AIDS-ravaged South Africa and used the funds not only to distribute condoms but to advocate decriminalization and legalization of the sex industry.[69] In 1995, SWEAT distributed a pamphlet whose goal was to "assist you in your career in the [sex] industry."[70] Funded with HIV/AIDS-prevention monies, SWEAT offered training in "sexual massage."[71]

The Tab Bazar brothel in Bangladesh is another example of an organization that perhaps helped prostituted persons in some small measure, but in reality, perpetuated the sex slavery of vulnerable women and children.[72] The brothel does in fact provide services for prostituted persons: condoms, HIV treatment, postnatal checkups, and gynaecological care.[73] Yet the brothel, the largest in Bangladesh, locks women and their children inside, "constantly available for purchase but out of public view."[74]

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69 Farley, *Prostitution Harms Women*, *supra* note 27, at 1113.

70 *Id.*

71 *Id.*

72 *Id.* at 1114.

73 *Id.*

74 *Id.*

Against this backdrop, it is even clearer that the United States has compelling reasons to adopt a policy that requires organizations combating HIV/AIDS through work with prostituted persons, to oppose prostitution and sex trafficking.[75] Organizations advocating the legalization of prostitution are promoting the interests of the commercial sex industry and, in cases such as the ones cited above, *are* the sex industry.

The United States has an interest in ensuring that federal money is spent on organizations that, while addressing HIV/AIDS's harm, will simultaneously attack the source of that harm, not defend it. In light of the extensive evidence of the devastation caused by prostitution and sex trafficking, this interest is truly a compelling one.

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[75] Indeed, in an action filed in the United States District Court for the District of Columbia, in which the plaintiff's claims are similar to the ones at issue here, the plaintiff is DKT International. DKT International's president is Phil Harvey, who runs a multi-million dollar pornography business. Complaint at 10-11, *DKT Int'l, Inc. v. U.S. Agency for Int'l Dev. et al.*, 435 F. Supp 2d 5 (D.D.C. 2005) (No. 05-01604); *U.S. Man's Porn Sales Helping Fight AIDS Overseas*, Associated Press, Oct. 10, 2005, http://ww1.aegis.org/news/ap/2005/AP051016.html.

CONCLUSION

As organizations led by, informed by and serving the survivors of, prostitution, *amici* submit this brief in support of a principle that is fundamental to our work: service providers can effectively help individuals in prostitution by providing harm-reduction measures such as condom distribution in the short term, while calling the prostitution industry a system of abuse and helping prostituted persons escape it. This pro-victim, anti-industry approach that guides *amici* also guides the legal method whose effectiveness has been proven in Sweden, where criminal penalties apply not to prostituted individuals but to those who buy and sell them.

We respectfully urge the Court to consider that organizations can oppose the prostitution industry without stigmatizing the individuals bought and sold in it, and Section 7631(f) of the Leadership Act, 22 U.S.C. § 7631(f), should be read to require just such an approach. We respectfully submit to the Court that Section 7631(f)'s requirement to "oppos[e] prostitution" in no way requires or would cause the stigmatization of the victims of prostitution. Quite the opposite: helping victims while opposing the industry that exploits them, is the best way to prevent HIV/AIDS, the best way to advance human rights, and the best way to fulfil the intent of the Leadership Act.

Respectfully submitted,

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APPENDIX A

Where available, below is a description of the *amici* subscribing to this brief:

Abolish Slavery works to transition and rehabilitate victims of modern-day slavery, prostitution, and human trafficking. Many people think slavery was abolished in 1865, but you might be surprised to know that there are more slaves today than at any time in human history. With the success of the Internet, there are not enough women and girls willing to satisfy the male demand for sex online, and with globalization and rising demand for cheap labor and the trends of outsourcing, more and more labor practices are coming into question. Especially with regard to the popular myth that most prostituted women chose the profession, we know now that most prostituted women did not choose to be in the circumstances they find themselves in, and that these forms of abuse, which include coercion and threat of violence with little to no pay are, in fact, forms of what we now call "human trafficking."

Aboriginal Women's Action Network, founded in 1995, is a Canadian-based organization led by and working to empower First Nations women and girls though community organizing, legislative advocacy, and awareness raising campaigns. AWAN recognizes that First Nations women and girls are disproportionately subjected to domestic violence, sexual assault, and exploitation and abuse in prostitution.

A Call To Men is a leading national violence prevention organization providing training and education for men, boys and communities. Our aim is to shift social norms that negatively impact our culture and promote a more healthy and respectful definition of manhood. We believe that preventing domestic and sexual violence is primarily the responsibility of men. Although historically it has been almost entirely women who have been at the forefront addressing this issue, we think it is essential that men play a primary role in the solution.

Apne Aap is a survivor-led service provider, based in Calcutta, Bihar, Delhi, and Mumbai, in India. Apne Aap Women Worldwide began as a community-based initiative of women in prostitution in the Khetwadi/ Kamatipura red light area of Mumbai in 2002. Twenty-two women in prostitution, who had worked with Emmy award-winning journalist Ruchira Gupta, to make a documentary, "The Selling of Innocents," started this organization to end their own exploitation and prevent their sisters from being exploited through sex trafficking. Apne Aap currently has community centers in Mumbai, Forbesgunge (Bihar), Kolkata and Delhi that provide support, counseling, income generating projects and referrals to women who have been trafficked and sold in prostitution.

Associazione degli Africani in Piemonte (AAP), ITALY is a non profit apolitical cultural organization with the main aim of promoting African identity in diaspora,

combating racism and all forms of discrimination, and cultivating peaceful cultural and social relations with peoples from other regions of the world.

Association IROKO is a survivor-led service provider that provides shelter, financial assistance, legal assistance, psychological support and counseling, language courses, cultural mediation, orientation for employment insertion, vocational training and other forms of assistance to victims of trafficking and other forms of sexual exploitation. It works to eliminate trafficking, prostitution and all forms of exploitation of women and children.

ASOMUPCAR is a civil society organization in Colombia, led by survivors of trafficking and exploitation of prostitution, which delivers comprehensive services for victims of sexual exploitation, including shelter, income generating projects, housing, backyard economy, industrial economic opportunities, counseling, and legal representation.

Bangladesh National Women Lawyers Association provides shelter, legal representation, and other urgently needed assistance to women and children subjected to gender violence and human trafficking, focusing on the recovery and reintegration of these victims.

Bangladesh Society for the Enforcement of Human Rights, the largest national organization in Bangladesh, with more than 350 chapters throughout the country, educates and empowers at risk communities to identify

sex trafficking victims and perpetrators, to report on cases, and to give support to the victims. BSEHR also conducts research into the high incidence of suicides of Bangladeshi women and girls, especially due to gender violence, while evolving mechanisms to counter such violence. BSEHR provides services and assistance to Bangladeshi women and girls exploited internationally in both sex and labor trafficking.

Bilateral Safety Corridor Coalition is a service provider. An alliance of over 60 agencies in the United States and Latin America that works along the U.S.-Mexico border to combat slavery and human trafficking. BSCC works bilaterally. Among its many projects, it administers a variety of services for victims of sexual exploitation and human trafficking.

Breaking Free, a survivor-led service provider, is an AfroCentric non-profit organization, launched in 1996, to serve women and girls involved in systems of prostitution and sex trafficking. Breaking Free works especially to overcome the sexual exploitation of African-American women and girls who are disproportionately represented among women in prostitution. Breaking Free provides shelter, support, counseling, HIV/AIDS outreach and prevention, including condoms, and referrals to victims of prostitution and trafficking.

Buklod Center, established in 1987 as a drop in center for women in prostitution outside the former U.S. Subic Naval Base in the Philippines, is a survivor-led collective work-

ing to empower women and children through organizing, education, and income generating activities. The Buklod Center's aim is to advocate for the interests of women, particularly those in the prostitution industry.

CATWLAC Mercosur is a network of more than 50 NGOs based in Argentina, Uruguay, Paraguay, Chile, Brazil and Bolivia that fight all contemporary forms of slavery, including trafficking and exploitation of prostitution and other forms of sexual exploitation, providing comprehensive services for victims and lobbying for better laws against the demand.

Center for Counseling and Information on Sexual Violence (Stigamot) is a counseling and information centre on sexual violence. Its two main goals are to support survivors of sexual violence and to raise awareness in society on a feminist platform. Stigamot provides counseling and referrals to victims of prostitution and trafficking and has a representative in the Icelandic Task Group against Trafficking organized by the Ministry of Justice and Ministry of Gender and Social Affairs. Stigamot has also testified on legislative bills regarding trafficking.

Coalition Against Trafficking in Women ("CATW") is a non-governmental organization that works to end human trafficking and the commercial sexual exploitation of women and children worldwide. CATW is the world's first organization to fight human trafficking internationally and is the world's leading abolitionist organization. A unique strength of CATW

is that we engage in advocacy, education, victim services and prevention programs for victims of trafficking and prostitution in Asia, Africa, Latin America, Europe, and North America, including in the United States. Since 1988, CATW has provided widely recognized leadership on local, national, regional, and international levels, in promoting legislative, policy and educational measures to raise awareness about the root causes of human trafficking. CATW holds Special Status with the United Nations Economic and Social Council (ECOSOC) and was a key consultant at the UN Transnational Organized Crime Meeting from 1999-2000 the outcome of which is the Palermo Protocol, the world's most recognized legal instrument on human trafficking.

Coalition Against Trafficking in Women and Girl in Latin America and the Caribbean, founded in 1990, is a nonprofit organization with networks in 25 countries that fights all contemporary forms of slavery, primarily the sexual exploitation of women and children.

Coalition Against Trafficking in Women, Asia-Pacific, headquartered in Manila, the Philippines, is the network of Asian and Pacific organizations, affiliated with the Coalition Against Trafficking in Women International, that conducts research, organizes campaigns, educates communities, and provides services to victims and survivors with a goal of ending all forms of the commercial sexual exploitation and trafficking of

women and girls in the Asia Pacific region and throughout the world.

Coalition Against Trafficking in Women Australia is an advocacy organisation, which engages in research and public education, and gives advice to policymakers, on the harms of legalised prostitution and trafficking in women in Australia.

Courtney's House was founded by Tina Frundt, a survivor of domestic child sex trafficking, Courtney's House provides services to commercially exploited youth in Washington D.C., Northern Virginia, and Southern Maryland, including intensive case management, educational assistance, support groups, trauma recovery counseling, group therapy, and street outreach.

Defensoras Populares is a Mexican non profit organization founded in 1994 that delivers comprehensive services to victims of gender-based violence, including women and girls in prostitution, and promotes women and children's human rights.

Embrace Dignity is a South African non-profit organization advocating for legal reform to end prostitution and sex trafficking, and offering services and support to women seeking exit, known as 'Sisters.' Embrace Dignity was instrumental in the establishment of Masiphakameni ('Stand Up'), a peer support group for prostituted women seeking exit. Embrace Dignity provides skills, resources and mentoring to build their capacity to

develop exit strategies that include resources to address post-traumatic stress disorder and trauma and advocacy/empowerment to encourage sustainability and local ownership.

Equality Now, founded in 1992, is an organization that advocates for the human rights of women and girls around the world by raising international visibility of individual cases of abuse, mobilizing public support through our global membership, and wielding strategic political pressure to ensure that governments enact or enforce laws and policies that uphold the rights of women and girls. With offices in New York, Nairobi and London, presences in Amman, Jordan and Washington, DC and a special initiative in Lusaka, Zambia, Equality Now's areas of focus include Discrimination in Law, Sexual Violence, Female Genital Mutilation (FGM) and Trafficking in Girls and Women.

Fundación CEDAI, a non-profit organization located in Paraguay, provides counseling to victims of trafficking, exploitation of prostitution, and other forms of sexual exploitation and has designed and implemented models of psychological intervention specifically for victims of these human rights violations.

Hagamos el Camino para una Vida Mejor is a community-based organization working to defend and empower indigenous women in Chiapas, Mexico.

Hunt Alternatives Fund was founded and is chaired by Ambassador Swanee Hunt, the Hunt

Alternatives Fund advocates for inclusive peace processes, combats the demand for prostitution and trafficking, inspires women to political leadership, supports social movement leaders, and strengthens youth arts organizations.

Instituto De Estudios De La Mujer "Norma Virginia Guirola De Herrera" (CEMUJER), a nonprofit organization in El Salvador working to promote gender equality and end trafficking in women and girls.

Interamerican Platform of Human Rights, Argentinean Chapter, is a civil society organization that promotes and defends human rights in Argentina and fights against all contemporary forms of slavery, including trafficking and exploitation of prostitution and other forms of commercial sexual exploitation.

Kvinnefronten (Women's Front) is a Norwegian organization, provides funding and support for programs offering support to victims. Kvinnefronten gives financial and technical support to NGOs that provide services to victims of prostitution and trafficking.

Mediterranean Network Against Trafficking in Women was launched in Marseilles, France in 2010, and it develops and coordinates programs and campaigns aimed at preventing all forms of sex trafficking and sex tourism in the Mediterranean region of Europe.

MensWork, based in Louisville, Kentucky, is a community based organization focusing on the development of male leadership to prevent all forms of violence against women.

Minnesota Indian Women's Resource Center is a community based non-profit that provides comprehensive services and advocacy for American Indian women and families in Minnesota. Among these services are harm reduction to adult and juvenile victims of sex trafficking and prostitution, with highly positive outcomes.

Minnesota Men's Action Network: Alliance to Prevent Sexual and Domestic Violence works to foster and develop peacemakers through modeling, mentoring, storytelling and dialogue.

Mujeres Transformando el Mundo is a nonprofit organization in Guatemala that provides services to women and girls victimized by prostitution, sex trafficking, and other forms of gender-based violence while promoting and defending the human rights of women and girls throughout Central America.

National Women's Coalition Against Violence & Exploitation is a volunteer operated non-profit organization that helps to inform, educate and prevent violence and exploitation against women and children nationally and internationally. Whether human trafficking, domestic violence, sexual assault, sexual violence, stalking, bullying, hate crimes and all other forms of violence

and exploitation against women and children, NWCAVE strives to keep the public informed and educated on how we can live in a more civilized society free of violence and human trafficking.

Oficina Jurídica para la Mujer, located in Cochabamba, Bolivia, is a nonprofit organization working to defend the rights of women in Bolivia and end all forms of violence and discrimination against women.

Prostitution Research & Education supports the legal right and the ethical necessity of the United States to refuse to fund organizations who promote legal or decriminalized prostitution.

Roks, the National Organisation for Women's Shelters and Young Women's Shelters in Sweden, is a feminist organisation that works for the rights and liberation of women and young women as well as equality at all levels. Roks provides comprehensive services to victims of domestic violence, sex trafficking, and related practices of violence against women.

Sex Trafficking Survivors United, an international coalition of sex industry survivors and survivor-led programs in the U.S., Europe, and Asia helping women exit and recover from the trauma of sex trafficking while educating the public about this urgent human rights crisis. Its mission is to empower sex trafficking survivors while joining their energy, efforts, and voices to end the sexual violence of prostitution everywhere.

Sextrade 101 is a Canadian organization advocating on behalf of those exploited by the sex trade and supporting sex slave survivors. It seeks to promote public awareness and education and assists in policy and legislative change, frontline training, program development, trauma counseling and peer mentoring for people involved in the sex trade.

The E.V.A. Center, a Boston-based survivor-led organization designed and implemented by women with direct experience in prostitution/trafficking, provides emergency access to safe shelter, specialized services, long term support, information and resources enabling women to exit the sex trade.

The Miramed Institute is a service provider. Founded in 1999, MiraMed Institute partners with 300 Russian NGOs and organized Russia's first anti-trafficking consortium, the Angel Coalition. MiraMed and the Angel Coalition operate Trafficking Victim Assistance Centers in Russia working internationally with law enforcement, NGOs and GOs, and the Russian Ministries of Foreign Affairs and Interior to rescue and repatriate Russian-speaking trafficking victims in Europe, the U.S., and the Middle East. MiraMed and the Angel Coalition provide training and direct support to nine regional safe house projects with help lines where victims of trafficking receive shelter and reintegration services. These nine safe houses are the only dedicated shelters in Russia specifically for victims of trafficking.

Trafficking in America Task Force has been working since 2004 to educate the American public about the sale of American women, men, and children into sexual slavery for the profit and pleasure of their perpetrators and the forced labor trafficking of both adults and children here in the United States.

Veronica's Voice is a survivor-led service provider named after Veronica April Neverdusky, a twenty-one-year-old prostituted woman, and the mother of three young children, who was found murdered in Penn Valley Park, Kansas City, MO. Veronica's Voice is the only prostitution recovery program in the Kansas City metropolitan area. The goal of Veronica's Voice is to empower women in prostitution to reclaim their lives, escape the violence of prostitution, and make healthy life choices. Veronica's Voice provides peer counseling, support groups, and on-site HIV-testing and counseling, and collaborates with other agencies to ensure that clients' basic survival, health, and safety needs are met.

The following individuals have also subscribed as *amici*:

Sigma Huda, former United Nations Special Rappatour on Human Trafficking.

Bridget Perrier, former victim of the sex trade, and current educator and speaker.

No. 12-10

IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,
Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DEANS AND PROFESSORS OF PUBLIC HEALTH AND ORGANIZATIONS WORKING IN PUBLIC HEALTH POLICY AND IMPLEMENTATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Lamont v. Postmaster General, 381 U.S. 301 (1965) 12

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 5, 9

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 22

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 6

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 6, 12

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) 9, 11

Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) 12

Stanley v. Georgia, 394 U.S. 557 (1969) 12

United States v. Alvarez, 132 S. Ct. 2537 (2012) 6, 22

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22 U.S.C. § 7603 15

22 U.S.C. § 7603(2) 15

22 U.S.C. § 7603(3)(A) 15

22 U.S.C. § 7603(3)(B) 15

22 U.S.C. § 7603(3)(C) 15

22 U.S.C. § 7603(3)(D) 15

22 U.S.C. § 7603(4) 7

22 U.S.C. § 7611(a)(2)(C) 15

22 U.S.C. § 7621(a)(3) 7

22 U.S.C. § 7621(a)(4) 7

22 U.S.C. § 7631(f) 2

45 C.F.R. § 89.3 2

United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, 117 Stat. 711 1

OTHER AUTHORITIES

AIDSTAR-ONE, *The Avahan-India AIDS Initiative: Promising Approaches to Combination HIV Prevention Programming in Concentrated Epidemics*, Mar. 2011 18-19

David Brown, *GAO Criticizes Bush's AIDS Plan*, Wash. Post, Apr. 5, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/04/04/AR2006040401628.html 6-7

Joanna Busza, *Having the Rug Pulled from Under Your Feet: One Project's Experience of the US Policy Reversal on Sex Work*, 21 Health Pol'y & Planning 329 (2006) 24, 25

Center for Health & Gender Equity, Policy Brief: *Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers*, Aug. 2008 25

Jon Cohen, *The Great Funding Surge*, 321 Science 512 (2008) 9-10

Melissa Hope Ditmore & Dan Allman, *An Analysis of the Implementation of PEPFAR's Anti-Prostitution Pledge and Its Implications for Successful HIV Prevention Among Organizations Working with Sex Workers*, 16 J. of the Int'l AIDS Soc'y, 2013, *available at* http://www.jiasociety.org/index.php/jias/article/view/17354/2894 ..... 21-22, 26

Henry J. Kaiser Family Found., Fact Sheet: The Global HIV/AIDS Epidemic: Fact Sheet, Dec. 2012, *available at* http://www.kff.org/hivaids/ upload/3030-17.pdf 5

Karnataka Health Promotion Trust, *Evaluation of Community Mobilization and Empowerment in Relation to HIV Prevention Among Female Sex Workers in Karnataka State, South India*, 2012, *available at* http://strive.lshtm.ac.uk/system/files/attachments/KHPT%20Evaluation%20of%20Community%20Mobilization.pdf 16, 19

Jennifer Kates, et al., *Financing the Response to AIDS in Low- and Middle-Income Countries: International Assistance from Donor Governments in 2010* (Henry J. Kaiser Family Foundation & UNAIDS), Aug. 2011, *available at* http://www.kff.org/hivaids/upload/7347-07.pdf. 9

Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Med. 1571 (2008) 23, 24

Gail Kennedy et al., *Systematic Review of Integration of Maternal, Neonatal, and Child Health and Nutrition, Family Planning and HIV* (United States Agency for International Development May 2011), *available at* http://www.ghtechproject.com/files/MNCHN-HIV%20FINAL% 2012%2012%2011.pdf. 9

Martha C. Nussbaum, *Sex and Social Justice* (Oxford Univ. Press 1999) 23

Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (Apr. 13, 2010) 2

Dale Paddock, *Bill Gates Wants to Pay You $100,000 to Build a Condom that Feels Good, Man*, Gawker (Mar. 24, 2013, 10:45 AM), http://gawker.com/5992138/bill-gates-wants-to-pay-you-100000-to-build-a-condom-that-feels-good-man 7

Prabhakar Parimi et al., *Mobilising community collectivisation among female sex workers to promote STI service utilisation from the government healthcare system in Andhra Pradesh, India*, 66 J. Epidemiology & Community Health 62 (2012), *available at* http://jech.bmj.com/content/early/2012/04/05/jech-2011-200832.full.pdf 19

PEPFAR World Activities map, *available at* http://www.pepfar.gov/documents/organization/195542.pdf 17

Michael M. Phillips & Matt Moffett, *Brazil Refuses U.S. Aids Funds, Rejects Conditions*, Wall St. J., May 2, 2005, at A3 26

Report of the UNAIDS Advisory Group on HIV and Sex Work and HIV, Dec. 2011..... 20, 21

Fiona Scorgie, et al., *'We Are Despised in the Hospitals': Sex Workers' Experiences of Accessing Health Care in Four African Countries*, 15 Culture, Health & Sexuality: An Int'l J. for Res., Intervention & Care 450 (2013) 18

Doshi Sheetal, *Sex Workers on the Front Lines of Prevention*, International Consortium of Investigative Journalists, a Project of the Center for Public Integrity (Nov. 30, 2006), *available at* http://www.icij.org/projects/divine-intervention/sex-workers-front-line-prevention..... 22

Priya Shetty, *Profile: Meena Saraswhati Seshu: Tackling HIV for India's Sex Workers*, 376 Lancet 17 (2010) 25

Papa Salif Sow & Steven Ward, *Reinventing the Condom, Impatient Optimists* (Bill & Melinda Gates Found.) Mar. 18, 2013, http://www.impatientoptimists.org/Posts/2013/03/Reinventing-The-Condom 7

UNAIDS Guidance Note on HIV and Sex Work, 2009-2012 17-18

U.S. Dep't of State, *PEPFAR Blueprint: Creating an AIDS-Free Generation*, 2012 ..... 10, 18, 23

U.S. President's Emergency Plan for AIDS Relief, Examples of PEPFAR Platforms Strengthening the Effectiveness and Sustainability of Country Efforts on Health, *available at* http://www.pepfar.gov/documents/organization/176785.pdf 8

World Bank, *The Global HIV Epidemics Among Sex Workers*, 2013, *available at* http://www.worldbank.org/content/dam/Worldbank/document/GlobalHIVEpidemicsAmongSexWorkers.pdf 16, 17, 20

World Health Organization, *Prevention and Treatment of HIV and other Sexually Transmitted Infections for Sex Workers in Low- and Middle-income Countries: Recommendations for a Public Health Approach*, Dec. 2012, *available at* http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf. 19

INTEREST OF *AMICI CURIAE*

Amici curiae are deans and professors of public health and public health law, as well as organizations working in the public health sector, either by delivering public health services to individuals and communities or by advocating for public health policies. *Amici* include the deans of the leading public health schools in the United States, professors and other individuals that are internationally recognized for expertise in HIV/AIDS, and organizations at the forefront of the battle against HIV/AIDS. Individual *amici* are specifically identified with their statements of interest in an appendix to this brief.

Amici curiae are engaged in the policy and science of protecting and improving the health of communities through education, promotion of healthy lifestyles, and research for disease and injury prevention. *Amici* include organizations that are directly affected by the requirement set forth in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), Pub. L. No. 108-25, 117 Stat. 711, that denies funding to any organization that does not "have a

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[1] A letter from Petitioners consenting to the filing of this brief is on file with the Clerk. A letter from Respondents consenting to the filing accompanies this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*'s counsel made a monetary contribution to the preparation or submission of this brief. Some *amici* are members of Respondent InterAction.

policy explicitly opposing prostitution" or to any organization that engages in speech or activities that the government deems inconsistent with an explicit opposition to prostitution. 22 U.S.C. § 7631(f). *Amici* believe that complying with this requirement will result in alienating the groups that public health organizations most need to reach and educate in order to achieve the goals set forth in the Leadership Act. Moreover, the prohibition on unspecified private speech and activities has a chilling effect that will preclude public health organizations, including some *amici*, from doing the work necessary to achieve the Leadership Act's goals.

SUMMARY OF ARGUMENT

The President's Emergency Plan for AIDS Relief (PEPFAR) is the largest commitment by any nation in history to combat disease. PEPFAR represents a massive infusion of funds into the public health sector—$48 billion over the current five-year authorization period. However, as set forth in the Leadership Act, access to PEPFAR funding is conditioned upon an organization "hav[ing] a policy explicitly opposing prostitution," and refraining from engaging in any speech or activities that the government deems to be "inconsistent with" that policy. 22 U.S.C. § 7631(f); Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (Apr. 13, 2010); *see also* 45 C.F.R. § 89.3. This requirement extends not only to what a recipient says or does with PEPFAR funds, but even to what an organization says or does with its own private funds. *See* 22 U.S.C. § 7631(f).

Although this anti-prostitution pledge requirement is embedded in PEPFAR's authorizing statute, the pledge has been largely unenforced against American non-governmental organizations ("NGOs"), in part because of the preliminary injunction granted by the district court in this case. Now, this Court is being asked whether the Constitution permits the pledge to be extracted from those NGOs in exchange for receiving PEPFAR funds. *Amici*—deans, professors, and organizations active in the field of public health—respectfully urge the Court to affirm the Second Circuit, allowing the marketplace of ideas to continue generating best practices in the fight against HIV/AIDS, regardless of ideology.

The public health field is empirically driven and depends upon access to information. When the marketplace of ideas in public health operates without ideological restrictions, researchers and organizations on the ground can work hand in hand to develop best practices and to disseminate information about those best practices. This free circulation of ideas is particularly critical in the fight against HIV/AIDS, where public health researchers have found that some of the most effective strategies for combating the disease involve actively engaging sex workers as partners in the fight. Enforcing the anti-prostitution pledge requirement would chill research, development, and discussion of some of these best practices because organizations accepting PEPFAR funding would fear even coming close to the line of saying or doing something "inconsistent" with a policy explicitly opposing prostitution. The pledge

requirement is not only antithetical to First Amendment values, but also undermines the Leadership Act's goal of eradicating HIV/AIDS.

ARGUMENT

I. The Anti-Prostitution Pledge Distorts the Marketplace of Ideas in Public Health.

As this Court recently held, the "First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). In that open marketplace, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Id.* Yet that is exactly what the government has done in this case. By conditioning the receipt of PEPFAR funds on an organization's willingness to take the anti-prostitution pledge, the government is compelling organizations to espouse the government's position. As the Second Circuit held, the anti-prostitution pledge requirement in this case falls well beyond what this Court has previously upheld as a permissible funding condition.

Compelled speech is particularly dangerous in the context of public health. Determining the most effective ways to prevent and treat disease requires that differing viewpoints be expressed, different methods be tested, and different results be discussed. But the government is conditioning an organization's access to funding to prevent and treat HIV/AIDS on

a requirement that only one viewpoint be expressed, that some methods never be tested, and that certain results not be discussed. The dangers of distorting the marketplace of ideas in the field of public health by commandeering public health organizations to adopt and adhere to the government's position are enormous, and there are real-world consequences. This Court has previously rejected the government's attempts at such distortion of the marketplace of ideas and it should do so again here. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) ("The private nature of the speech involved here, and the extent of [the] regulation of private expression, are indicated further by the circumstance that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.").

A. Public Health's Marketplace of Ideas Depends on a Diversity of Views.

The science-driven field of public health encompasses many disciplines—from epidemiology and biostatistics to medicine and nursing—and many times more perspectives, including those of academics, umbrella organizations, and NGOs on the ground. The methods used in public health are common to all applied sciences, but they take on a particular sense of urgency in the fight against HIV/AIDS, a global epidemic that claims 7,000 new infections every day.[2] Participants in the public

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[2] Henry J. Kaiser Family Foundation, Fact Sheet: The Global HIV/AIDS Epidemic (Dec. 2012), *available at* http://www.kff.org/hivaids/upload/3030-17.pdf.

health sector examine empirical data, form hypotheses, implement programs, and collect yet more data to refine their prevention and treatment strategies. Meanwhile, NGOs on the ground adopt "best practices," working to stem the spread of infection even as newer approaches are tested.

These characteristics mark public health as a marketplace of ideas, where diversity of opinion is not only inherent, but also essential to the results it generates. Like speech on matters of public concern more generally, debate over matters of public health functions best when it is "uninhibited, robust, and wide-open." *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the principles animating the field of public health are the same principles that underlie our constitutional democracy. The entire "theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion) (citation omitted); *see id.* ("Society has the right and civic duty to engage in open, dynamic, rational discourse."). And the very "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

The vitality of the marketplace of ideas in public health depends on attracting more voices, not fewer. At times ideas in public health may spark controversy,[3] or even draw derision.[4] But a steady

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[3] *See, e.g.*, David Brown, *GAO Criticizes Bush's AIDS Plan*,

infusion of new concepts is necessary to stay ahead of an epidemic. Congress recognized as much in passing the Leadership Act. Government alone cannot do the work. Rather, as Congress found, partnerships with NGOs are "critical to the success of ... efforts to combat HIV/AIDS," 22 U.S.C. §§ 7603(4), 7621(a)(4), because such partnerships result in "combining financial and other resources, scientific knowledge, and expertise," *id.* § 7621(a)(3).

This leveraging of public and private resources to increase scientific knowledge and expertise is just what has happened in the years since the Leadership Act was passed. For nearly a decade, NGOs have worked with the government to implement successful

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Wash. Post, Apr. 5, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/04/04/AR2006040401628.html (noting that PEPFAR's abstinence policies were "the most controversial aspect of the giant AIDS plan").

[4] *See, e.g.*, Papa Salif Sow & Steven Ward, *Reinventing the Condom*, Impatient Optimists (Bill & Melinda Gates Foundation Mar. 18, 2013), http://www.impatientoptimists.org/Posts/2013/03/Reinventing-The-Condom (describing a current initiative by the Gates Foundation which offers a monetary prize to develop a condom that men will want to use on a consistent basis—an initiative motivated in part by the fact that "[w]omen, particularly those in high risk groups such as commercial sex workers, often face difficulties negotiating condom use; the fact that the term 'condom negotiation' even exists and is so common in discussions about HIV prevention or reproductive health speaks to the central shortcoming of our current generation of condoms"); Dale Paddock, *Bill Gates Wants to Pay You $100,000 to Build a Condom that Feels Good, Man*, Gawker (Mar. 24, 2013, 10:45 AM), http://gawker.com/5992138/bill-gates-wants-to-pay-you-100000-to-build-a-condom-that-feels-good-man.

strategies in combating HIV/AIDS. Because of the preliminary injunction in this case, U.S.-based NGOs have done so without taking the anti-prostitution pledge. Thus, academics, umbrella organizations, and U.S. NGOs working on the ground have been free to engage in vigorous debate and practice on a wide array of issues, from the most promising avenues for HIV/AIDS research to the most effective ways to reach at-risk populations, including sex workers. The debate has taken place in a manner that privileges evidence over ideology and research methods over simplified assumptions.

As just one example of how the marketplace of ideas is working to generate best practices in the prevention and treatment of HIV/AIDS, several years ago, PEPFAR programs began integrating maternal and child health by creating a one-stop shop at many primary health care facilities. The idea spread such that a pregnant woman at a PEPFAR-funded clinic now routinely receives HIV counseling and testing, prevention of mother to child transmission measures if she is HIV-positive, and information on family planning. This has created a generation of women more educated and engaged in their pregnancies and more receptive to facility-based deliveries, resulting in healthier mothers, healthier children, and a marked improvement in the survival of both.[5] It has also created a model for

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[5] U.S. President's Emergency Plan for AIDS Relief, Examples of PEPFAR Platforms Strengthening the Effectiveness and Sustainability of Country Efforts on Health, *available at* http://www.pepfar.gov/documents/organization/176785.pdf.

delivering care that researchers continue to study to determine its effectiveness.[6]

Should the government begin to enforce the pledge against U.S.-based NGOs, their ability to speak freely and contribute to the debate about best practices in the fight against HIV/AIDS would be at risk. When the government requires that a condition of entry into a debate is the adoption of the government's position, it is obvious that the marketplace of ideas will become distorted. *See Legal Servs. Corp.*, 531 U.S. at 543; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–32 (1995) (the contention that "debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways"). Here, the risk is magnified because the United States government, through PEPFAR and other programs, provides more than half of global funding for HIV/AIDS treatment and prevention by donor governments.[7] PEPFAR alone constitutes more than one fifth of total annual resources available for the fight against HIV/AIDS.[8] Thus, the

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[6] See, e.g., Gail Kennedy et al., *Systematic Review of Integration of Maternal, Neonatal, and Child Health and Nutrition, Family Planning and HIV* (United States Agency for International Development May 2011), *available at* http://www.ghtechproject.com/files/MNCHN-HIV%20FINAL%2012%2012%2011.pdf.

[7] Jennifer Kates, et al., *Financing the Response to AIDS in Low- and Middle- Income Countries: International Assistance from Donor Governments in 2010*, at 6 (Henry J. Kaiser Family Foundation & UNAIDS Aug. 2011), *available at* http://www.kff.org/hivaids/upload/7347-07.pdf.

[8] John Cohen, *The Great Funding Surge*, 321 Science 512, 514

danger of distortion has practical, real world consequences as it means potentially cutting off the main source of funding for research that has shown the most potential for reaching some of the most affected populations.

On the urgency of reaching sex workers in order to combat the spread of HIV/AIDS, the parties are in agreement. As the United States government itself acknowledges, evidence-based interventions to provide HIV services to sex workers are a "smart investment."[9] Different views remain, however, on the most effective means of curtailing the spread of HIV among sex workers. That diversity can be seen even in the briefs submitted in this case. While the government implies that there are only two possible opinions about prostitution—that an organization can either "promote or affirmatively condone" prostitution or "oppos[e]" it, *see* Pet. Br. at 37—that contention is belied by its own *amici*. The Coalition Against Trafficking in Women, et al., supporting Petitioners, argues for the partial *decriminalization* of prostitution, an approach in which criminal sanctions against sex workers are eliminated, though

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(2008).

[9] U.S. Dep't of State, *PEPFAR Blueprint: Creating an AIDS-Free Generation*, Nov. 2012, at 26 ("What does the term smart investments mean for PEPFAR? First, it means prioritizing interventions that science indicates will save the most lives as outlined in the previous chapter: Road Map to Saving Lives. Second, it means going where the virus is—targeting those key populations at most risk and in most need of HIV services. Third, it means maximizing the impact of each dollar invested."); *id.* at 29 (describing "sex workers" as a "key population").

penalties against clients still apply. *See* Brief of the Coalition Against Trafficking in Women, et al. at 23. *Amici* cite studies to argue that partial decriminalization "has proven effective" and helps to reduce sex trafficking. *Id.* However, the anti-prostitution pledge could foreclose the ability of organizations, ironically including the government's own *amici*, to argue their position because it could be perceived as inconsistent with the pledge. *See infra* p. 23.

As even the brief of its *amici* demonstrates, the issue is far more complicated than the government's overly simplistic formulation that an organization either "promote[s] or affirmatively condone[s]" prostitution or "oppos[es]" it. Pet. Br. at 37. Rather, the real public health issue is how best to stem the HIV/AIDS pandemic in one of the most vulnerable and affected populations—sex workers. To answer that question, the government is "expend[ing] funds to encourage a diversity of views from private speakers," about the best ways to engage and treat this population. *Rosenberger*, 515 U.S. at 834. Yet, the government would deny all funding to those private speakers who, even using exclusively private funds, take the view that the best way to engage and treat this population is to do so in a manner that does not explicitly oppose prostitution (a view that appears to be advocated at least in part even by the government's own *amici*). That is not permissible under the First Amendment.

B. The Public Health Marketplace Depends on the Right of the Public to Receive Information.

This Court has long recognized that the First Amendment protects not only the rights of the speaker, but also the rights of the audience to receive speech. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *Red Lion Broad. Co.*, 395 U.S. at 390 ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers.").

This right to receive information is of particular importance in practical, science-based fields such as public health. Access to information is the very engine of empiricism. And that means access to *all* information, not just the information the government wants listeners to hear. Indeed, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) (quoting *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.)).

Information sharing is the lifeblood of the public health community. NGOs that implement programs on the ground often do not have the time or resources to independently investigate competing views about the best way to access at-risk populations. Instead,

they take their cues from umbrella organizations whose resources are devoted to distilling the latest research and pointing out best practices. These umbrella organizations in turn depend on academics and researchers to aggregate data and publish studies on what is working and what is not working in the field.

This collaborative dynamic points to a central misconception in the government's brief. The effect of an organization's reluctant "choice" to endorse the government's viewpoint in exchange for PEPFAR funds cannot be confined to that organization. *Cf.* Pet. Br. at 17–19. If the grantee speaks publicly or otherwise shares its views, it necessarily cannot speak freely about public health issues that touch upon the issue of prostitution. The anti-prostitution pledge thus distorts the information that other organizations and academics use to formulate the best practices of the future. Conversely, the pledge and its effects can also mislead NGOs that may refuse PEPFAR funds for themselves, but look to a grantee for forthright guidance on best practices in HIV/AIDS prevention and treatment.

In a field where empirical conclusions should be prioritized over policy debates, the government's insistence that an entire organization must affirmatively adopt its viewpoint (even where funds could easily be segregated) is really an attempt by the government to co-opt some of the most credible institutions in the public health field and make it appear that no one disagrees with the government's viewpoint. And this boost to the credibility of the government's message comes at a cost to *amici*. An

organization that takes the anti-prostitution pledge in order to receive PEPFAR funding may well risk its own credibility, since listeners will be left to wonder whether the practices promoted by the organization are truly "best practices" or merely the practices that best comply with the government's viewpoint.

In sum, there is no question that government may make a value judgment favoring a particular public policy and may choose to promote that policy through its spending power. But the legitimacy of the government's ultimate goal does not empower the government to use means that are inconsistent with the First Amendment. The anti-prostitution pledge requirement crosses the line from a mere refusal to subsidize particular activities to an affirmative use of subsidies to compel speech endorsing one viewpoint and silencing another. The requirement constricts the speech available in the public health sphere, distorts the empirical process of gathering data and adapting best practices, and ultimately harms the very population that PEPFAR funds were meant to help. The regulations cannot be upheld under the First Amendment.

II. The Anti-Prostitution Pledge Hinders the Public Health Community from Achieving the Leadership Act's Goal of Eradicating HIV/AIDS.

The anti-prostitution pledge requirement is not just bad law. It is also bad policy. The requirement actually hinders the public health community from achieving the goals set forth in the Leadership Act. The purpose of that Act is to "to strengthen and

enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics," by "providing increased resources" and "intensifying efforts to prevent HIV infection; ensure the continued support for, and expanded access to, treatment and care programs; enhance the effectiveness of prevention, treatment, and care programs; and address the particular vulnerabilities of girls and women." 22 U.S.C. § 7603, (2), (3)(A)–(D). Congress further required that PEPFAR participants respond to "evidence-based improvements and innovations in the prevention" of HIV/AIDS. 22 U.S.C. § 7611(a)(2)(C).

Each of these central purposes is stymied by the anti-prostitution pledge. First, the pledge thwarts the use of proven strategies in HIV/AIDS prevention that entail nonjudgmental approaches to sex workers, such as community empowerment and mobilization strategies that directly engage sex workers in the fight against HIV/AIDS. Second, the pledge chills all speech and activities that grantees fear could be perceived by the government as "inconsistent" with a policy explicitly opposing prostitution, thus preventing organizations from even trying out new approaches that may eventually prove effective in treating and preventing HIV/AIDS.

A. Proven Strategies in HIV/AIDS Prevention and Treatment Include Nonjudgmental Engagement with Sex Workers.

Sex workers are among the most marginalized populations in the world. In addition to facing

elevated levels of HIV infection, sex workers battle stigma, discrimination, and violence, factors that frustrate access to HIV/AIDS services. Many of the strategies that have proven effective in the fight against HIV/AIDS are those that address sex-worker stigma directly, including through the use of drop-in centers, peer educators, and programs that help sex workers gain the determination to negotiate consistent condom use with their clients. In the public health field, such strategies are often known as "community mobilization" or "empowerment" efforts.[10] For many NGOs, it is vital to their mission and success that they actively engage risk populations including sex workers. That requires not alienating them with views that actually do not reflect the organization's beliefs, informed by evidence and practice.

There is no question that the goals of the Leadership Act cannot be achieved without addressing the epidemic of HIV/AIDS in the sex worker population. The prevalence of HIV infection among female sex workers globally is 11.8 percent—13.5 times the prevalence of HIV infection among women generally.[11] In the regions PEPFAR focuses

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[10] *See, e.g.*, Karnataka Health Promotion Trust, *Evaluation of Community Mobilization and Empowerment in Relation to HIV Prevention Among Female Sex Workers in Karnataka State, South India*, 2012, *available at* http://strive.lshtm.ac.uk/system/files/attachments/KHPT%20Evaluation%20of%20Community%20Mobilization.pdf.

[11] World Bank, *The Global HIV Epidemics Among Sex Workers*, 10–11 (2013), *available at* http://www.worldbank.org/content/dam/Worldbank/document/GlobalHIVEpidemicsAmongSexWorkers.pdf.

on,[12] the figures are even graver. The prevalence of HIV infection among female sex workers in sub-Saharan Africa, for example, is a tragic 36.9 percent.[13] As these numbers graphically demonstrate, there is an urgent need to engage with sex workers if there is any hope of stemming the tide of the global HIV/AIDS epidemic.

Yet public health organizations face serious obstacles in engaging sex workers to obtain HIV/AIDS services, including prevention, testing, and treatment. According to UNAIDS—an organization that is statutorily exempted from taking the pledge—"In many countries, laws, policies, discriminatory practices, and stigmatizing social attitudes drive sex work underground, impeding efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programmes. Sex workers frequently have insufficient access to adequate health services; male and female condoms and water-based lubricants; post-exposure prophylaxis following unprotected sex and rape; management of sexually transmitted infections, drug treatment and other harm reduction services; protection from violence and abusive work conditions; and social and legal support. Inadequate service access is often compounded by abuse from law enforcement officers." UNAIDS Guidance Note

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[12] *See PEPFAR World Activities* map, July 19, 2012, *available at* http://www.pepfar.gov/documents/organization/195542.pdf.

[13] World Bank, *The Global HIV Epidemics Among Sex Workers*, 2013, at 10, *available at* http://www.worldbank.org/content/dam/Worldbank/document/GlobalHIVEpidemicsAmongSexWorkers.pdf.

on HIV and Sex Work, 5 (2009–12) (footnote omitted).[14] These barriers are also acknowledged by the United States government: "Key populations (men who have sex with men (MSM), sex workers (SW), people who inject drugs (PWID)) typically have HIV prevalence rates that exceed those of the general population. However, stigma, discrimination and fear of violence or legal sanctions often undermine their access to health care, including HIV services. Breaking down these barriers is essential to achieving an AIDS-free generation." *PEPFAR Blueprint*, at 29.

Over the last decade—as PEPFAR's anti-prostitution pledge was stayed against U.S.-based NGOs and private funding sources joined the fight against HIV/AIDS overseas—U.S. NGOs have been able to experiment with strategies that combat stigma and discrimination among sex workers while providing desperately needed HIV/AIDS services.[15]

The Avahan India AIDS Initiative, funded by the Bill & Melinda Gates Foundation, implemented many of these strategies on an ambitious scale. *See* AIDSTAR-ONE, *The Avahan-India AIDS Initiative: Promising Approaches to Combination HIV Prevention Programming in Concentrated*

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[14] *See also* Fiona Scorgie, et al., *'We Are Despised in the Hospitals': Sex Workers' Experiences of Accessing Health Care in Four African Countries*, 15 Culture, Health & Sexuality: An Int'l J. for Res., Intervention & Care 450, 456–58, 461 (2013).

[15] Even with the preliminary injunction in place, U.S.-based NGOs that collaborate with foreign NGOs were still constrained in part by the pledge since the pledge has been enforced against foreign NGOs.

Epidemics, Mar. 2011. In addition to funding clinics and providing condoms, Avahan recruited sex workers to work as peer educators, paying them a stipend in an effort to reduce turnover. *Id.* at 2, 6–7. Avahan also facilitated community services such as crisis-response teams to address violence and harassment, including at the hands of police. *Id.* at 9. Research on these efforts has found a strong correlation between community mobilization and empowerment strategies and improved health and social outcomes, including a reduction in the incidence of sexually transmitted infections (STIs).[16]

Organizations explicitly exempted by the Leadership Act from the anti-prostitution pledge have also embraced best practices entailing nonjudgmental sex worker outreach. The World Health Organization, for example, "strong[ly] recommend[s]" community empowerment strategies as a means of HIV/AIDS prevention.[17]

That position is also advocated by the World Bank. A recent study by the World Bank found that

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[16] Karnataka Health Promotion Trust, *supra* note 9, at 25–27; *see also* Prabhakar Parimi et al., *Mobilising community collectivisation among female sex workers to promote STI service utilisation from the government healthcare system in Andhra Pradesh, India*, 66 J. Epidemiology & Community Health 62 (2012), *available at* http://jech.bmj.com/content/early/2012/04/05/jech-2011-200832.full.pdf.

[17] World Health Organization, *Prevention and Treatment of HIV and other Sexually Transmitted Infections for Sex Workers in Low- and Middle-income Countries: Recommendations for a Public Health Approach* (Dec. 2012), at 21, *available at* http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf.

"[e]xpanding a community empowerment-based approach to comprehensive HIV prevention intervention among sex workers has demonstrable impact on the HIV epidemics among female sex workers, cumulatively averting up to 10,800 infections among sex workers across epidemic scenarios within a five-year time span" and averting up to an additional 20,700 infections in the general adult population during that same timeframe.[18] That same study also found that "[w]here sex worker organizations have partnered with government actors, the response to HIV among sex workers has been particularly effective and sustainable."[19] And it concluded with a recommendation that that future research into this area allow sex worker organizations to more meaningfully participate in the decision-making process regarding the research itself.

Similarly, a recent report of the UNAIDS Advisory Group noted that "[e]fforts to empower sex workers as a way of improving difficult working conditions have resulted in measurable improvements in sex workers' quality of life, self-confidence and agency. Studies have documented good social and economic outcomes, increased social capital, [and] high rates of condom use."[20] The report recommended that policymakers "[s]upport the development of sex worker-led organisations that

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[18] *Global HIV Epidemics Among Sex Workers*, *supra* note 13, at xxvii-xxviii.

[19] *Id.* at xxxii.

[20] Report of the UNAIDS Advisory Group on HIV and Sex Work, Dec. 2011, at 22.

advocate for, and implement, programmes to reduce sex workers' economic and social vulnerability," and specifically cautioned that policymakers should "[e]nsure that access to economic empowerment programmes is not conditional on leaving sex work or reducing involvement in sex work."[21]

As these studies demonstrate, directly engaging and empowering sex workers in the fight against HIV/AIDS has proven tremendously successful. Yet if the pledge goes into effect, U.S.-based NGOs would likely be precluded from engaging in any of these strategies. The pledge would therefore undermine the very goals the Leadership Act is trying to advance.

B. The Anti-Prostitution Pledge Threatens to Chill The Use of Best Practices by U.S. Organizations.

Plainly an organization may not use PEPFAR funds to advocate the legalization of prostitution, and neither Respondents nor *amici* contend otherwise. But beyond this prohibition, it is not entirely clear what speech or strategies an organization can engage in without running afoul of the governmental requirement that an organization not do anything "inconsistent" with an explicit policy opposing prostitution.[22] Consequently, enforcing the

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[21] *Id.* at 24–25.

[22] *See* Melissa Hope Ditmore & Dan Allman, *An Analysis of the Implementation of PEPFAR's Anti-Prostitution Pledge and Its Implications for Successful HIV Prevention Among Organizations Working with Sex Workers*, J. of the Int'l AIDS Soc'y, 2013, at 8, *available at* http://www.jiasociety.org/index.php/jias/article/view/17354/2894 ("Specific activities

pledge requirement threatens to chill the speech and activities of organizations engaged in the very strategies that have thus far proven effective in engaging sex workers in the fight against HIV/AIDS.

Because organizations that take the pledge are not only at risk of losing future PEPFAR funding, but may also have to pay back past PEPFAR funding,[23] organizations will likely not come anywhere close to the line of perceived "inconsistency" with an anti-prostitution stance. "The mere potential for the exercise of [governmental] power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez*, 132 S. Ct. at 2548 (plurality opinion); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 621 (1998) (Souter, J., dissenting) ("We have explained before that the prospect of a denial of government funding necessarily carries with it the potential to 'chil[l] ...

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prohibited by this restriction have never been defined; rather, guidance has been vague. This vagueness has led to arbitrary and unsystematic interpretations of the pledge, contributing to self-censorship by grant recipients.").

[23] *See, e.g.*, Doshi Sheetal, *Sex Workers on the Front Lines of Prevention*, International Consortium of Investigative Journalists, a Project of the Center for Public Integrity (Nov. 30, 2006), *available at* http://www.icij.org/projects/divine-intervention/sex-workers-front-line-prevention (describing how a settlement between the U.S. government and foreign NGO SANGRAM over its refusal to sign the pledge led to SANGRAM voluntarily returning a portion of the disputed grant that had already been disbursed).

individual thought and expression.'") (alterations in original) (citation omitted).

Outright advocacy for a change in prostitution's legal status hardly represents the outer reaches of the anti-prostitution pledge. The anti-prostitution pledge requirement would equally chill ambivalent statements predicting that "[t]he legalization of prostitution . . . is likely to make things better for women who have too few options to begin with." *See* Martha C. Nussbaum, *Sex and Social Justice* 278 (Oxford Univ. Press 1999). It would likely foreclose the advocacy of one of the government's own *amici* for the reduction of penalties on prostitutes themselves. *See supra* p. 11. And it would seem to create significant tensions with factual observations that the PEPFAR program itself has published.[24]

Because engaging in potentially "inconsistent" speech can decimate the budget of an NGO and bring unwanted political attention, chilling effects are inevitable. Indeed, research suggests that scientists often engage in self-censorship when their funding is threatened by political controversy. *See* Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Med. 1571 (2008). This study interviewed scientists whose NIH grants for analyzing aspects of sexual behavior or drug use

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[24] *See PEPFAR Blueprint*, at 29 ("[S]ex workers [and other marginalized groups] typically have HIV prevalence rates that exceed those of the general population. However, stigma, discrimination and *fear of* violence or *legal sanctions* often undermine their access to health care, including HIV services. *Breaking down these barriers is essential to achieving an AIDS-free generation.*" (emphasis added)).

(many related to HIV/AIDS) were the focus of a minor political controversy that began on the floors of Congress. None of the researchers' grants were withdrawn as a result of the controversy, but several years later, a majority of the respondents either strongly agreed or agreed with the statement that the "political controversy created a 'chilling effect' in research, dissuading scientists from studying controversial research." *Id.* at 1574. Half responded to the controversy by removing "red flag" words such as "sexual intercourse," "sex workers," and "harm-reduction" from titles and abstracts. *Id.* at 1575. Others abandoned lines of research for fear funding would be eliminated, and a few interviewees left scientific research altogether. *Id.* at 1575–76.

The fate of U.S. organizations under the anti-prostitution pledge may well follow the ominous precedent set by foreign organizations, which have been subject to the pledge requirement from the beginning. Indeed, U.S. organizations that collaborate with foreign organizations have already felt the chilling effects of the pledge as any international collaboration is necessarily constrained by the foreign organization's obligation not to be perceived as doing anything "inconsistent" with an anti-prostitution stance.

As just one example of the pledge's effects, in the early 2000s, Doctors without Borders embarked on a community empowerment approach to HIV/AIDS prevention among sex workers in a red-light district in Svay Pak, outside of Phnom Penh, Cambodia.[25]

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[25] *See* Joanna Busza, *Having the Rug Pulled from Under Your*

The program included a primary health clinic, condom distribution, and a drop-in center where sex workers could learn English and basic computing skills. After the pledge went into effect, "[p]ressure increased to avoid being seen to condone or promote prostitution" and "this threatened the project's ability to respond appropriately to changing circumstances in Svay Pak."[26] The project eventually closed down as it could no longer effectively serve its population. This is just one example of how "affected organizations are likely to take a low profile rather than confront donors and risk sudden loss of funds."[27]

Other foreign organizations have abandoned projects when they learned the funding would be conditioned on an anti-prostitution pledge. In one well-documented example, the organization SANGRAM, which works to address HIV/AIDS in rural parts of India where HIV prevalence levels are among the highest, returned its PEPFAR funding rather than sign the pledge, reversing a planned expansion of its peer education and condom distribution program.[28] SANGRAM determined that accepting PEPFAR funds would put at risk its

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Feet: One Project's Experience of the US Policy Reversal on Sex Work, 21 Health Pol'y & Planning 329 (2006).

[26] *Id.* at 331.

[27] *Id.*

[28] Center for Health & Gender Equity, *Policy Brief: Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers*, Aug. 2008, at 3; *see also* Priya Shetty, *Profile: Meena Saraswhati Seshu: Tackling HIV for India's Sex Workers*, 376 Lancet 17, 17 (2010).

strategy of engaging sex workers as agents of change for the community.

In addition, the pledge may deter organizations from pursuing HIV/AIDS interventions in nations where criminal sanctions for prostitution have been removed. Famously, Brazil rejected $40 million in HIV/AIDS funding from the United States precisely because it would not agree to the prostitution pledge.[29] U.S. NGOs are most effective when they do not unnecessarily provoke their host countries, but adopting the anti-prostitution pledge may have just that effect in Brazil and other countries where the legal status of prostitution differs from its status in the United States.

Recent research examining the impact of the anti-prostitution pledge among foreign NGOs has concluded that "[a]s a result of the pledge, in many instances information sharing about successful programming with sex workers has nearly ceased. Sex work programming has become a taboo topic [. . .] The anti-prostitution pledge has prevented the sharing of information about successful programming and prevented scaling up successful operations."[30]

The drastic, organization-wide consequences for engaging in activities deemed "inconsistent" with the

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[29] *See* Michael M. Phillips & Matt Moffett, *Brazil Refuses U.S. Aids Funds, Rejects Conditions*, Wall St. J., May 2, 2005, at A3 (May 2, 2005) (noting that "[p]rostitution isn't a crime in Brazil, and prostitutes' associations are among the most active groups engaged in anti-AIDS work").

[30] Ditmore & Allman, *supra* note 22, at 11.

anti-prostitution pledge inevitably heightens the risk that the fight to eradicate HIV/AIDS—and the exchange of ideas toward that effort—will be chilled. Neither the objectives of the Leadership Act nor the First Amendment permit that result.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

IDENTIFICATION OF AMICI

Deans of Schools of Public Health and Professors of Public Health and Public Health Law

Leo Beletsky, JD, MPH, is Assistant Professor of Law and Health Sciences at Northeastern University School of Law, with a particular interest in the intersection of law, human rights, and health. His work focuses on HIV prevention among drug users and sex workers in domestic and international settings, including Mexico, Russia, and Central Asia. In 2011, the anti-prostitution pledge threatened the cancellation of a project focusing on sex-worker health in Tijuana, Mexico, for which he was a Co-Investigator.

Chris Beyrer, MD, MPH, is Professor and Director of the Johns Hopkins Fogarty AIDS International Training and Research Program. He is also Director, Johns Hopkins Center for Public Health & Human Rights; Co-PI, Johns Hopkins Center for AIDS Research (JHU CFAR); and Associate Director, Center for Global Health.

Paul D. Cleary, PhD, is Dean and Anna M.R. Lauder Professor of Public Health, Yale School of Public Health. He is also Director of the Yale Center for Interdisciplinary Research on AIDS (CIRA). CIRA's mission is to support the conduct of interdisciplinary research focused on the prevention of HIV infection and the reduction of negative consequences of HIV disease in vulnerable and underserved populations nationally and abroad.

José F. Cordero, MD, MPH, is Professor and Dean, Graduate School of Public Health, Medical Sciences Campus, University of Puerto Rico.

James Curran, MD, MPH, is Dean and Professor of Epidemiology, Rollins School of Public Health, Emory University. He is also Co-Director of Emory's Center for AIDS Research and was Co-Chair of the first IOM Evaluation Report on PEPFAR Implementation (2007) entitled *PEPFAR Implementation: Progress and Promise.*

Julio Frenk, MD, MPH, PhD, is Dean of the Faculty, Harvard School of Public Health, and T & G Angelopoulos Professor of Public Health and International Development, Harvard School of Public Health and Harvard Kennedy School.

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Lawrence O. Gostin is University Professor, Georgetown Law School, as well as the Founding O'Neill Chair in Global Health Law and the Faculty Director of the O'Neill Institute for National and Global Health Law. He is also the Director of the World Health Organization Collaborating Center on Public Health Law & Human Rights.

Sofia Gruskin, JD, MIA is Professor of Preventive Medicine, Keck School of Medicine, Professor of Law and Preventive Medicine, Gould School of Law and Director, Program on Global Health and Human Rights, Institute for Global Health, University of Southern California; and Adjunct Professor of Global

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Michel Kazatchkine, MD, is Professor of Medicine, Université René Descartes in Paris, and former Executive Director of the Global Fund to fight AIDS, Tuberculosis and Malaria. He is currently a senior fellow of the Global Health Program at the Institute for International Affairs and Development in Geneva, and the UN Special Envoy on AIDS in Eastern Europe and Central Asia.

Martin McKee, CBE, MD, DSc, is Professor of European Public Health, London School of Hygiene and Tropical Medicine.

Peter Piot, MD, PhD, FMedSci, is Director and Professor of Global Health, London School of Hygiene & Tropical Medicine. He is also Former Executive Director of UNAIDS (Joint United Nations Programme on HIV/AIDS) and former Under Secretary-General of the United Nations.

Barbara K. Rimer, DrPH, is Dean and Alumni Distinguished Professor, UNC Gillings School of Global Public Health. She is also the vice-chair of the Task Force on Community Preventive Services, which reviews the evidence for non-clinical preventive services.

Stephen M. Shortell, PhD, MPH, MBA, is Professor and Dean, School of Public Health, UC-Berkeley.

Steffanie A. Strathdee, PhD, is Harold Simon Professor, Associate Dean of Global Health Sciences,

and Chief, Division of Global Public Health, University of California San Diego School of Medicine.

Lindsay F. Wiley, JD, MPH, is Assistant Professor of Law and Faculty Director of the Health Law & Justice Program at American University Washington College of Law. The Health Law & Justice Program's mission is to advance the health law field through training programs and multidisciplinary research that focuses on promoting public health and social justice.

Organizations Working in Public Health Policy and Implementation

AIDS United seeks to end the AIDS epidemic in the United States through national, regional, and local policy/advocacy, strategic grant-making, and organizational capacity building. With partners throughout the country, AIDS United works to ensure that people living with and affected by HIV/AIDS have access to the prevention and care services they need and deserve. AIDS United programs and initiatives include the development and implementation of sound public health policy in response to the HIV/AIDS epidemic. The organization works to advance federal policies that improve the quality of life and ensure access to treatment and care for all those living with HIV/AIDS.

American Jewish World Service ("AJWS"), inspired by Judaism's commitment to justice, works to realize human rights and end poverty in the developing

world. Based on its experience working with organizations across three continents, AJWS knows that the anti-prostitution pledge undermines efforts to stem the tide of HIV/AIDS by limiting prevention outreach targeting high-risk and marginalized populations.

amfAR, The Foundation for AIDS Research, was founded in 1985 and is dedicated to ending the global AIDS epidemic through innovative research. With the freedom and flexibility to respond quickly to emerging areas of scientific promise, amfAR plays a catalytic role in accelerating the pace of HIV/AIDS research and achieving real breakthroughs. amfAR-funded research has increased understanding of HIV and has helped lay the groundwork for major advances in the study and treatment of HIV/AIDS. Since 1985, amfAR has invested more than $366 million in its mission and has awarded grants to more than 2,000 research teams worldwide.

Center for Health and Gender Equity ("CHANGE") is a U.S.-based nongovernmental organization that promotes the sexual and reproductive health and human rights of women and girls worldwide through the development and implementation of U.S. policies. CHANGE seeks to create a world where sexual and reproductive health and rights are universally recognized, and where comprehensive, integrated sexual and reproductive health services are accessible and available to all, free from coercion, violence, and discrimination. Through research, policy analysis, and field visits, CHANGE has witnessed the negative impact the policy in question

has on the health and rights of sex workers, endangering their lives and slowing the fight against HIV and AIDS.

Center for Reproductive Rights is a global non-governmental organization that uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to respect, protect, and fulfill. The Center's work includes policy advocacy, public education, and litigation to protect the human rights of women with HIV. For example, in 2010, the Center issued a fact-finding report documenting violations of the reproductive rights of HIV-positive women in Chilean health facilities. Similarly, in 2008, the Center published a report demonstrating that women living with HIV in Kenya suffer multiple human rights violations and encounter daunting barriers to quality healthcare, including physical and verbal abuse, discriminatory standards of care, and violations of their rights to informed consent and confidentiality. The Center highlighted findings from this report at the 2008 meeting of the United Nations Commission on the Status of Women. Finally, in the U.S., the Center regularly brings litigation to protect the rights of reproductive health care providers that includes claims based on the right to be free from compelled government speech.

Elizabeth Glaser Pediatric AIDS Foundation, founded in 1988, seeks to prevent pediatric HIV infection and to eradicate pediatric AIDS through research, advocacy, and medical programs. With financial support from the U.S. government and in

partnership with ministries of health and indigenous organizations, it currently works at more than 5,500 sites and in 15 countries to implement HIV prevention, care, and treatment services.

Elton John AIDS Foundation ("EJAF") is one of the largest HIV/AIDS grant-making organizations in the world, focusing on direct care and prevention programs around the globe, with an emphasis on marginalized populations, including sex workers. EJAF believes that eradicating stigma is the single most important step to achieving an AIDS-free world.

Family Care International ("FCI") seeks to improve the health and well-being of women, girls, and newborns in the developing world by working to make pregnancy and childbirth safer; ensure universal access to reproductive health care and information; and empower women, young people, and communities. FCI supports this case because it is fully committed to ensuring universal access to reproductive health care and information. FCI believes the anti-prostitution pledge is a clear violation of women's right to full information and services related to reproductive health, and to organizations' rights to provide services and information that meet women's needs.

Health GAP's mission is to eliminate barriers to HIV treatment for people around the world. Health GAP seeks to strengthen and enhance United States leadership and the effectiveness of the United States' response to the HIV/AIDS, tuberculosis, and malaria

pandemics, by advocating for increased resources and sound public policies. The anti-prostitution pledge is counter to Health GAP's efforts and serves as a barrier to treatment.

HIV Medicine Association (HIVMA) of the Infectious Diseases Society of America represents more than 5,000 physicians and other health care providers who practice HIV medicine. HIVMA represents members from all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and 83 countries outside of the United States. HIVMA members are researchers and clinicians who devote a majority of their time to preventing, treating, and eventually eradicating HIV disease. HIVMA strongly supports sound public-health policies that are grounded in science and social justice to promote effective HIV prevention, care and treatment, and research.

Human Rights Center at the University of California Berkeley School of Law conducts research on war crimes and other serious violations of humanitarian law, including the public health impacts of armed conflict, to protect vulnerable populations and support efforts to hold perpetrators accountable. The Human Rights Center upholds the right of everyone to the enjoyment of the highest standard of health without discrimination of any kind.

International Secretariat of Global Alliance Against Traffic in Women's ("GAATW") mission is to ensure that the human rights of all migrating women are respected and protected by authorities and agencies. GAATW promotes rights of women migrant workers

and trafficked persons and believes that ensuring safe migration and fair work places should be at the core of all anti-trafficking efforts. GAATW advocates for living and working conditions that provide women with more alternatives in their countries of origin, and to develop and disseminate information to women about migration, working conditions, and their rights. GAATW advocates for the incorporation of Human Rights Standards in all anti-trafficking initiatives, including in the implementation of the Trafficking Protocol, Supplementary to the UN Convention on Transnational Organized Crime (2000). GAATW strives to promote and share good practices of anti-trafficking initiatives but also to critique practices and policies that are having a negative impact or are causing harm to trafficked persons, migrants, and other communities. GAATW supports the self-organization of women in vulnerable and marginalized situations, especially migrant workers in the informal sector and aims to strengthen their efforts of self-representation and advocacy.

IntraHealth International has worked for more than 30 years at empowering health workers to better serve communities in need in more than 100 countries around the world. IntraHealth International fosters local solutions to health care challenges by improving health worker performance and strengthening health systems. IntraHealth International believes that the health workers it supports must be enabled to apply nonjudgmental approaches to all of their clients, including sex

workers, and to work closely with all members of the communities they serve without fear of reprisal.

Knowledge Ecology International ("KEI") is an international nonprofit, nongovernmental organization that searches for better outcomes, including new solutions, to the management of knowledge resources. In particular, KEI is focused on the management of these resources in the context of social justice and human rights. KEI is particularly drawn to areas where current business models and practices by businesses, governments, or other actors fail to adequately address social needs or where there are opportunities for substantial improvements. Among other areas, KEI has expertise in access to medicines and medical technologies as well as access to knowledge issues.

Partners In Health ("PIH"), a Boston-based non-profit organization, provides health care to patients worldwide with an emphasis on serving the most marginalized populations and providing them with a preferential option to care and treatment. Women and youth who are forced into sex work constitute a significant group of those most marginalized. PIH believes that by actively opposing prostitution through the "pledge requirement" and subsequently restricting access to programs preventing and treating HIV/AIDS, as well as comprehensive health services, these groups will be further stigmatized, isolated, and deprived of life-saving services.

Physicians for Human Rights ("PHR") is an independent organization that uses medicine and

science to stop mass atrocities and severe human rights violations against individuals. For more than 25 years, the organization has conducted rigorous investigations and research into a wide range of health and human rights issues, and in 1997 was a co-recipient of the Nobel Prize for Peace. During the past decade PHR implemented a highly successful six-year program to document and advocate for best practices in the global response to HIV-AIDS, during which time the organization collaborated closely with many recipients of PEPFAR funds. Through its Program on Sexual Violence in Conflict Zones, PHR currently partners with many international and local organizations in advocating for a comprehensive and non-discriminatory response to victims of sexual violence.

Planned Parenthood Federation of America ("PPFA") is the oldest and largest provider of reproductive health care in the United States, delivering medical services through 754 health centers operated by 73 affiliates across the United States. PPFA also operates an international program, Planned Parenthood Global, that partners with local healthcare providers in developing countries in Africa, South and Central America, and with leading international health organizations, to deliver and to improve capacity and practices for the delivery of reproductive health care. Planned Parenthood Global focuses on contraceptive services, HIV testing and treatment, and reducing the incidence of unsafe abortion.

Trust for America's Health ("TFAH") is a non-profit, non-partisan organization dedicated to saving lives by protecting the health of every community and working to make disease prevention a national priority.

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IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR *AMICUS CURIAE* HEARTBEAT INTERNATIONAL, INC. IN SUPPORT OF RESPONDENTS

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H.B. 291, 50th Leg., 1st Sess. (N.M. 2011) 9

H.B. 452, 2010 Sess. (Va. 2010) 9, 25

H.B. 1146, 2008 Reg. Sess. (Md. 2008) 9

H.B. 2373, 2009 Leg., Reg. Sess. (W. Va. 2009) 9

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H.B. 2837, 61st Leg., 2010 Reg. Sess. (Wa. 2010) 9

H.B. 5158, 95th Leg., Reg. Sess. (Mich. 2009)..... 8, 9

H.R. 3425, 76th Leg. Assemb., Reg. Sess. (Or. 2011) 9

Montgomery County, Md. Resolution 16-1252 (2010)..... 9

New York, N.Y., Local Law 17 § 20-815 (g) (2011)..... 8, 9

S. 188, 2010 Gen. Assemb., Reg. Sess. (Va. 2010) 9, 25

S. 690, 2008 Reg. Sess. (Md. 2008) 8

S. 769, 76th Leg. Assemb., Reg. Sess. (Or. 2011) 9

S. 6452, 61st Leg., 2010 Reg. Sess. (Wa. 2010) 9

OTHER AUTHORITIES

Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377 (2001) 14

Choose Life America, Inc., http://www.choose-life.org 25, 26

Family Research Council, *A Passion to Serve*, http://www.apassiontoserve.org/ 6, 7

Family Research Center, A Passion to Serve, Pregnancy Resource Center Service Report (2d ed. 2011), *available at* http://downloads.frc.org/EF/EF12A47.pdf 7

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David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. Rev. 995 (1982) 13

Supreme Court Rule 37.6 1

STATEMENT OF INTEREST*

Amicus curiae Heartbeat International is a life-affirming organization that provides resources and leadership development and training to pregnancy help centers, maternity homes, and nonprofit adoption agencies. The 1,300-plus pregnancy help centers affiliated with *Amicus* meet a dire public need by providing over 1.2 million individuals annually with a variety of pregnancy-related services including peer counseling, education, and various kinds of material support.

Affirmative speech requirements regularly threaten the ability of *Amicus* and its affiliates to carry out this work. Indeed, many jurisdictions in the United States have targeted pregnancy help centers with damaging affirmative speech requirements, including laws that compel the centers to provide disclaimers stating their positions on abortions and emergency contraceptives—forcing the centers to raise these sensitive issues according to the government's timing and judgment rather than their own. These requirements threaten to undermine these centers' ability to continue their charitable mission and to communicate their desire to protect the sanctity of all life and their support for alternatives to abortion.

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* Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* has made a monetary contribution to the preparation or submission of this brief. The parties' letters of consent to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

The freedom of speech is one of our first and most fundamental constitutional rights. *Amicus* agrees with Respondents Alliance for Open Society International, Inc. ("AOSI"), *et al.*, that the Policy Requirement in this case imposes an unconstitutional burden on that crucial freedom. *Amicus* submits this brief to help the Court better understand the dangers of approving any such affirmative speech requirement. The experience of pregnancy help centers with affirmative speech requirements demonstrates the significant burdens they place on free speech. The burden on private speech would be no different if imposed as funding conditions, and the fact that such requirements could be tied to vital government "funding" like § 501(c)(3) tax-exempt status (and that doing so would inevitably burden even protected private expression) is especially troubling.

The First Amendment protects speakers from affirmative speech requirements like the Policy Requirement in this case and those targeting pregnancy help centers. The "freedom of speech" the First Amendment secures against government infringement includes the freedom to decide whether to speak, what to say, and how to say it. Affirmative speech requirements inevitably burden these basic rights by taking these protected choices away from the speaker in favor of the government. In doing so, these requirements invade individual "freedom of mind" and conscience by restricting a person's ability to decide for himself whether and how to express his thoughts, ideas, and beliefs; they allow the government to manipulate and distort the First

Amendment-protected open marketplace of ideas by co-opting and skewing private speech to increase the volume of the government's desired message; and they smack of government paternalism—offensive to basic human dignity—which the First Amendment unequivocally rejects.

Pregnancy help centers' continuing struggle against affirmative speech requirements underscores the incompatibility of those requirements with the First Amendment's protection and purposes. Affirmative speech requirements threaten to undermine these centers' core message and charitable mission. Abortion-rights advocacy groups have lobbied for such requirements in jurisdictions across the country, resulting in more than a dozen proposed bills and several enactments. Some of these affirmative speech requirements (including those enacted in New York City and Baltimore) would compel pregnancy help centers that do not provide or refer for abortions or emergency contraceptives to provide disclaimers indicating their position on these services. These requirements would alter the content of the centers' communications with clients by forcing them to adopt the government's judgment on when to introduce such sensitive subjects and by requiring the centers to communicate the government's message that abortions are available as a morally acceptable alternative—a message with which the centers disagree. All of these affirmative speech requirements (1) distort the market of ideas by skewing the centers' speech and ensuring communication of the government's desired message in nearly every place a pregnant woman would go for help and (2) evince the paternalistic view that women who visit pregnancy centers are not smart enough to

get the information they need, and that the government, not pregnancy centers, knows how best to present the various options available to pregnant women. None has survived a First Amendment challenge thus far.

To be sure, unlike the directly coerced speech requirements currently targeting pregnancy help centers, the Policy Requirement imposed by the government in this case is a condition of government funding. But whether such requirements burden speech by direct coercion or by denying eligibilty for a benefit, they still impermissibly penalize or inhibit the complement of rights that make up freedom of speech. And unlike speech restrictions, the government cannot "cure" that burden by providing an alternative channel for expression; once speech is compelled, the burden concretizes, and the bell is irrevocably rung.

Until now, this Court has rightly not recognized a meaningful constitutional distinction between directly coerced speech and speech required as a funding condition. Accordingly, a decision upholding the Policy Requirement here could dramatically erode First Amendment protection against both. Even if the Court tried to draw a line between the two, it would open the door to creative methods of manipulating private speech through government-compelled speech requirements tied to various government benefits. Attaching these onerous requirements to § 501(c)(3) status is a particularly troubling possibility. Moreover, public funding is often inextricably linked with private expression, which makes it inevitable that even affirmative speech requirements tied to public funding will burden protected private speech.

For these reasons, this Court should affirm the Second Circuit's decision, thereby continuing to shield the core political speech of nonprofits like AOSI and pregnancy help centers from the serious burdens caused by affirmative speech requirements imposed by the government.

ARGUMENT

I. EFFORTS TO USE AFFIRMATIVE SPEECH REQUIREMENTS TO BURDEN THE FREEDOM OF SPEECH OF PREGNANCY HELP CENTERS ARE INTENSIFYING EVEN THOUGH THEY ARE CLEARLY UNCONSTITUTIONAL.

A. Affirmative Speech Requirements Imposed By State and Local Governments Threaten To Undermine Pregnancy Help Centers' Charitable Mission.

Over 2,300 pregnancy help centers in all fifty states support women and their families through a wide range of services. These services may include free pregnancy tests; one-on-one, nonjudgmental peer counseling; material assistance; medical referrals; parenting classes; education and employment counseling; risk avoidance education for youth; information on and testing for sexually transmitted diseases; post-abortion counseling; 24-hour hotlines; and referrals to adoption agencies and other support services. *See generally* Family Research Council, *A Passion to Serve*, http://www.apassiontoserve.org/ (last visited Apr. 2, 2012). Centers typically provide these and most other offered services at no cost to their clients. All told, they reach more than 1.2 million people every year.

Through many of these services, pregnancy help centers affiliated with *Amicus* seek to help women considering abortion to understand all of their options and to empower them with alternatives so that they can make more informed decisions. Pregnancy help centers do not offer or refer clients for abortions or emergency contraceptives (in fact,

many do not provide medical services at all). What they do offer is options counseling: honest, complete, and nonjudgmental counseling regarding all pregnancy options. Volunteer counselors provide clients with information on each of their options: They educate women about the joys and challenges of parenting and may offer referrals to support groups and other education sources and services; they present and discuss adoption and offer referrals to agencies with special expertise; and they provide up-to-date, medically accurate information on abortion risks and procedures. *Id.*

Despite the public need they meet, pregnancy help centers face increasing attacks. Particularly over the last several years, abortion-rights advocacy groups have lobbied state and local governments to pass laws imposing damaging regulations on pregnancy help centers. These efforts are little more than a thinly veiled attempt by these groups to advance their pro-choice political agenda by discrediting and distorting the charitable mission and message of these centers. Unfortunately, they have gained some traction, mostly by citing highly suspect "investigative reports" authored by abortion-rights groups like NARAL Pro-Choice America and based on anecdotal "evidence" gathered by their interns posing as fake clients. *See, e.g.*, Family Research Center, A Passion to Serve, Pregnancy Resource Center Service Report 6 (2d ed. 2011), *available at* http://downloads.frc.org/EF/EF12A47.pdf (stating that a doctor testifying in favor of one anti-pregnancy-center bill "conceded that the NARAL study—foundational to the bill—had methodological flaws and was biased.").

Laws imposing affirmative speech requirements on pregnancy help centers pose a particularly troubling threat. Abortion rights activists have teamed with pro-choice legislators in many states to introduce bills that would require pregnancy help centers to provide damaging written and verbal "disclaimers" to every client. Without fail, these proposed disclaimers would substantially damage and interfere with the centers' sensitive relationship with clients and even cause potential clients to turn away.

For instance, some proposed disclaimer requirements would target the core mission of pregnancy help centers by wresting away their decision about how best to communicate with women about their pregnancy options. Specifically, the anti-pregnancy-center bills proposed in various jurisdictions (and enacted in some) would require pregnancy centers that do not perform or refer for abortions or emergency contraceptives to disclose their position on these services via conspicuous signs, initial verbal disclosures, or advertisements (and in New York City's case, all three). *See, e.g.*, Baltimore, Md. City Ordinance 09–252 (2009) *amending* Baltimore City Health Code §§ 40–14(e)(7) and 41–14(6); New York. N.Y., Local Law 17 § 20–815(g) (2011). And a 2009 Michigan bill would have actually forced pregnancy help centers to provide referrals for abortions and emergency contraceptives, effectively forcing the centers to abandon their *raison d'être*. H.B. 5158, 95th Leg., Reg. Sess. (Mich. 2009).

All told, at least a dozen state and local legislatures have recently considered affirmative speech requirements on pregnancy help centers. S. 690, 2008 Reg. Sess., at 2 (Md. 2008); H.B. 1146,

2008 Reg. Sess. (Md. 2008); Baltimore, Md. Ordinance 09–252 (2009) *amending* Baltimore City Health Code §§ 40–14(e)(7) and 41--14(6); Montgomery County, Md. Resolution 16–1252 (2010); H.B. 5158, 95th Leg., Reg. Sess. (Mich. 2009); H.B. 291, 50th Leg., 1st Sess., at 3 (N.M. 2011); Assemb. A03638, 2009–2010 Leg., Gen. Sess. (N.Y. 2009); New York, N.Y. Local Law 17 § 20–815(g) (2011); S. 769, 76th Leg. Assemb., Reg. Sess. (Or. 2011); H.R. 3425, 76th Leg. Assemb., Reg. Sess. (Or. 2011); Austin, Tx. Ordinance 20100408–027 (codified at Code Ch. 10–9 (2010)) (repealed 2012); Austin, Tx. Ordinance 20120126–045 (codified at Code Ch. 10–10 (2012)); S. 188, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 452, 2010 Sess. (Va. 2010); S. 6452, 61st Leg., 2010 Reg. Sess. (Wa. 2010); H.B. 2837, 61st Leg., 2010 Reg. Sess. (Wa. 2010); H.B. 2373, 2009 Leg., Reg. Sess. (W. Va. 2009). So far, most have failed to secure passage.

Four of these proposed affirmative speech requirements targeting pregnancy help centers have been enacted, however—those in Austin, Texas; Baltimore and Montgomery County, Maryland; and New York City. While they vary in the details, each of these laws essentially requires pregnancy centers that do not provide or refer for abortions or emergency contraceptives to affirmatively state their position on, or the availability of, these services by sign, verbal disclaimer, or both. Not one has withstood First Amendment challenge thus far. *See Greater Baltimore Center for Pregnancy Concerns, Inc. v. Baltimore*, 683 F.3d 539, 558 (4th Cir. 2012) (awaiting en banc decision); *Tepeyac v. Montgomery Cnty.*, 683 F.3d 591, 594 (4th Cir. 2012) (awaiting en

banc decision); *Evergreen Ass'n v. City of New York*, 801 F. Supp. 2d 197 (S.D.N.Y. 2012).

B. The First Amendment Protects Speakers From Affirmative Speech Requirements

Affirmative speech requirements like these have yet to withstand First Amendment challenge because they contravene basic rights the First Amendment protects and the fundamental purposes it furthers.

1. It is well established that the "freedom of speech" the First Amendment secures against government infringement includes the right to decide whether to speak, what to say, and how to say it. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573–74 (1995) (explaining that when a speaker chooses to speak, he has the right under the First Amendment to "tailor" or "shape" his speech, both generally and to a specific audience). By "[m]andating speech that a speaker would not otherwise make," *Riley*, 487 U.S. at 795, government-compelled speech restricts or takes away those constitutionally protected choices. This content-manipulative effect of affirmative speech restrictions is inherent, regardless of whether government compels a speaker to communicate a statement of "opinion" or of "fact." Either type of statement "necessarily alters the content" of a speaker's message and therefore "burdens protected speech." *Id.* at 795, 798. For these reasons, "Some of this Court's leading First Amendment precedents have

established the principle that freedom of speech prohibits the government from telling people what they must say," and if it does, its action is subject to "the most exacting scrutiny." *Rumsfeld v. FAIR*, 547 U.S. 47, 61 (2006).

The affirmative speech requirements directed at pregnancy help centers are paradigmatic examples of a constitutionally impermissible burden on free speech rights. Pregnancy help centers seek to offer careful, sensitive, non-judgmental peer counseling to pregnant women. This counseling provides an open and honest discussion of women's options while communicating the centers' deeply held views about the sanctity of life. The various disclaimers proposed for and imposed on the centers by local governments would necessarily alter (and often undermine) this core speech. Such disclaimer requirements burden the free speech rights of pregnancy help centers in two key ways.

First, they force centers to adopt the government's judgment on when to introduce subjects like abortion and birth control. As the Fourth Circuit recognized, this sort of requirement "inevitably alters the course of a center's communications with a client or potential client by requiring that the [p]regnancy [c]enter's initial communication occur in the presence of a stark and immediate statement about abortion and birth-control." *Greater Baltimore Center*, 683 F.3d at 558. Peer counselors are open to having an honest discussion with pregnant women about all of their options, including abortion. But it is their right and prerogative under the First Amendment to decide when and how to approach these sensitive and difficult issues.

Second, compelling this speech requires pregnancy centers "to participate in the City's effort to tell pregnant women that abortions are available elsewhere as a morally acceptable alternative, contrary to the moral and religious beliefs of [these centers]." *Id.* at 552. Mandating that centers communicate these government-supplied messages against their will (and their own judgment) effectively and impermissibly hijacks the centers' constitutionally protected choices about which content and viewpoint to espouse and how to communicate and tailor their own messages.

2. As with other content-based speech regulation, affirmative speech requirements are also incompatible with the various related purposes of the First Amendment as articulated by this Court.

First, affirmative speech requirements contravene the First Amendment's protection of individual freedom of mind by restricting a person's ability to decide for himself whether and how to express his thoughts, ideas, and beliefs. *See, e.g.*, *Turner Broadcasting Sys, Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."). For instance, a person compelled to salute and pledge allegiance to the flag, or forced to subscribe a patriotic oath, loses the option to protest government action by sitting or not signing, respectively. *See Barnette v. W. Va. State Bd. Of Educ.*, 319 U.S. 624, 642 (1943); *Speiser v. Randall*, 357 U.S. 513 (1958). What's more, if the individual disagrees with the compelled message, he is then effectively forced to

engage in additional speech to disavow that message if he wants to correct a misimpression of his views. Each of these consequences of affirmative speech requirements effectively cedes to partial government control "the individual's ability to define the persona he presents to the world" as well as his individual "freedom of conscience." David B. Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C. L. Rev. 995, 1004 (1982).

Nonprofit entities that wish to espouse or support specific moral and religious views are particularly affected by the encroachment on individual "freedom of mind" caused by affirmative speech requirements. For instance, the disclaimer requirements targeting pregnancy help centers force them to significantly alter the message they wish to present to clients—*i.e.*, their message that compassionate, moral, sensible alternatives to abortion exist, and that their mission focuses on those options. An upfront, stark disclaimer that they do not offer or refer for abortion or emergency contraceptives seriously distracts from that message and undermines its impact.

Second, affirmative speech requirements allow the government to manipulate and distort the "open marketplace" the First Amendment creates so that "differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012). Affirmative speech requirements are especially dangerous tools of market distortion because they co-opt a class of private speakers as the vehicle for the desired government message. Instead of simply

injecting the government's independent message into the market, they also necessarily "skew" the message of all of the private speakers compelled to communicate the government's message. *See* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1491 (2001). This problem is exacerbated if recipients of the message do not recognize the role of the government in compelling it, *id.*; in such circumstances, the government has essentially hijacked private speech and altered it to better fit its desired message or outcome with many recipients none the wiser.

These market-distorting features are evident in the affirmative speech requirements targeting pregnancy help centers. For instance, laws that require the centers to disclose that they do not offer or refer for abortions or emergency contraceptives force them "to participate in the City's effort to tell pregnant women that abortions are available elsewhere as a morally acceptable alternative." *Greater Baltimore Center for Pregnancy Concerns*, 683 F.3d at 552. This means that nearly every place a pregnant woman might visit for help will communicate to them the government's desired message that abortions are available and morally acceptable, despite the existence of a substantial portion of speakers (the centers in particular) in that group of organizations who disagree. This government-mandated drowning-out of that alternative view is made worse by the fact that the very entities who would hold and communicate that view (the centers) must also provide the government's view, thus altering the content and overall effect of their own message.

Third, affirmative speech requirements smack of a government paternalism that the First Amendment unequivocally "rejects." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 & n.31 (1978) (explaining that the First Amendment "rejects the 'highly paternalistic' approach of statutes ... which restrict what the people may hear" or say simply out of fear that hearing or speaking it would be harmful to their own best interests). Governments typically impose affirmative speech requirements under the patronizing assumption that the speaker will fail to provide information which—in the government's view—its audience needs to hear, or that the speaker will fail to communicate the message in a way the listener can understand. But as with speech restrictions, the First Amendment requires a different presumption: "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790–91. As for listeners, "our traditional understanding, embodied in the First Amendment, [is] that where the dissemination of ideas is concerned, it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them." *Id.* at 804 (Scalia, J., concurring). Nothing less would comport with the "human dignity inherent in all persons," *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

The affirmative speech requirements targeting pregnancy help centers certainly evince this paternalistic mindset. Legislators have cast these laws as necessary "disclaimers" under the assumptions that (1) the centers do not know how

best to present pregnant women with their options, and (2) clients of the centers may or will be misled into believing, *e.g.*, that the volunteer counselors are actually doctors or nurses, or that the centers will perform or refer for abortions or give out emergency contraceptives, or even that abortions are not legally available. In short, such requirements presume that the government, rather than the pregnancy help centers, know the best way to present the pregnancy-options discussion. A government is certainly entitled to that belief, but this Court has never considered such a paternalistic interest a sufficient reason to burden First Amendment expression.

II. THE DECISION IN THIS CASE WILL IMPACT THE FIRST AMENDMENT PROTECTION OF PRIVATE NONPROFIT ORGANIZATIONS AGAINST AFFIRMATIVE SPEECH REQUIREMENTS.

In this case, Respondents challenge an affirmative speech requirement imposed by the government. Unlike the affirmative speech requirements generally faced by pregnancy help centers, this one—which requires organizations to adopt a specific, government-provided policy statement—is a condition of government funding rather than a directly coerced speech requirement. As a constitutional matter, however, this Court has never deemed this distinction dispositive. Both types of affirmative speech requirements burden the complement of rights that make up First Amendment freedom of speech and contravene the various purposes animating the Amendment. Accordingly, a decision upholding affirmative speech requirements imposed as funding conditions could deal a

significant blow to the First Amendment's protection of individuals and private organizations against government-compelled speech generally. Even if the Court recognized a novel distinction between compelled-speech funding conditions and directly coerced speech, upholding the Policy Requirement based on that distinction would still erode First Amendment protection by opening a significant loophole through which governments could impose affirmative speech requirements. For nonprofit organizations, one of the more concerning consequences is the possibility of affirmative speech requirements tied to § 501(c)(3) tax-exempt status, but the possibilities for potential abuse are virtually endless. And given the practical reality that public funding is often inextricably linked to private expression, protected speech will almost certainly be burdened as a side effect of a funding-condition loophole.

A. Affirmative Speech Requirements Burden Freedom of Speech Whether Imposed Directly Or Tied To Public Funding.

This Court has firmly established that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit." *FAIR*, 547 U.S. at 59 (quoting *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003)). The reason for this "unconstitutional conditions" doctrine is straightforward:

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and

> inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (quoting *Speiser*, 315 U.S. at 526).

It is no answer to this objection to say that there is no real burden when speech is restricted or compelled as a condition of eligibility for a government benefit because a potential benefit recipient may simply refuse the funds. *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (invalidating a funding condition that banned editorializing by broadcast television stations, even though those stations could have avoided the restriction by forgoing the funding). If government action unconstitutionally burdens an individual's First Amendment rights, that burden is not magically cured simply because the government imposes the burden by denying eligibility for a government benefit rather than by simple coercion backed by criminal or civil penalties. Either form of burden suffices to impermissibly "penalize" or "inhibit" the right in question. *Perry*, 408 U.S. at 597; *Speiser*, 315 U.S. at 526.

This goes double for affirmative speech restrictions framed as conditions on government benefits because of the front-loaded, irrevocable nature of the burden imposed by compelled speech. This Court has permitted some speech *restrictions* as conditions on funding when those restrictions are placed on the government program being funded rather than on the recipient of the program's benefits. *See Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation*

With Representation, 461 U.S. 540 (1983). But, crucially, in these cases the recipient of funds could still freely express the restricted message through alternative, privately funded channels. *Compare Rust*, 500 U.S. at 197–98 *with League of Women Voters*, 468 U.S. at 399–402. Unlike restrictions on speech, the burden imposed by requiring an individual to speak a particular message cannot be "cured" by allowing the speaker an adequate alternative channel. As discussed above, the burden with this type of requirement comes as soon as the individual speaks the compelled message, which takes away the constitutionally protected choice whether to speak at all, "necessarily alters the content" of the speaker's message, *Riley*, 487 U.S. at 795, and impermissibly constrains his protected rights to "tailor" and "shape" that message, *Hurley*, 515 U.S. at 573. These bells cannot be unrung; the idea that providing an alternative channel would somehow ease that burden by allowing the speaker to *not* speak the message after he has already spoken it is as silly as it sounds.

For this reason, distinguishing between speech restrictions as funding conditions and affirmative speech requirements as funding conditions, and flatly prohibiting the latter, makes excellent sense. Indeed, when eligibility for a government benefit is instead made contingent on required *affirmative* speech, this Court has deemed it a violation of the First Amendment. *See Speiser*, 357 U.S. at 518 ("It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. ... To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.").

Making a government benefit contingent on an affirmative speech requirement also undermines the purposes of the First Amendment in the same way as directly coerced speech. In particular, the distorting effect on the marketplace of ideas will likely be similar regardless; if the benefit the government dangles to compel the speech is enticing—which it will be if the government wants to change speakers' behavior—it is fair to expect a similar increase in volume and proportion of the government's desired speech in the relevant market of ideas. And nothing at all changes with respect to the skewing effects and attribution problems caused by affirmative speech requirements. Moreover, because the burden to individual freedom of expression caused by affirmative speech requirements as funding conditions is similar (and not curable by alternative channels), they similarly would continue to interfere with the "freedom of thought" the First Amendment is meant to protect against state action. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

B. Approving The Policy Requirement Would Expose Even Private Nonprofit Organizations And Individuals To Government-Imposed Burdens On Their Protected Speech.

Because this Court has not recognized a meaningful constitutional distinction between direct affirmative speech requirements and those imposed as funding conditions, a decision upholding the affirmative speech requirement in this case could deal a significant blow to every individual's protection against government-compelled speech. To *Amicus*'s knowledge, a decision approving the

affirmative speech requirement in this case would be the Court's first to bless government authority to compel a private individual or organization to communicate a political message on its own behalf with particular content chosen by the government.

It goes without saying that this kind of erosion of this Court's so-far uniform rejection of affirmative speech requirements could make it harder for private organizations to defend against even directly coerced speech requirements. In fact, precisely because the Court has not distinguished between compelled-speech funding conditions like the Policy Requirement and direct speech regulations like those targeting pregnancy help centers, it may be only a small leap from upholding the former to approving the latter in the "right" case (perhaps a case in which the affirmative speech requirement seems wholly neutral, unobjectionable, and factual). At the least, upholding the Policy Requirement could constitute a step towards this slippery slope.

If the Court were to draw a new line between compelled-speech funding conditions and directly coerced speech, the results would certainly be just as disastrous. For that would open the door for creative methods of manipulating or controlling private speech through affirmative speech requirements tied to various government benefits. Perhaps the most troubling specter of such a result would be new affirmative speech requirements tied to an organization's status as a religious, educational, charitable, scientific, or literary organization under 26 U.S.C. § 501(c)(3). That status exempts these nonprofit organizations from taxes and allows taxpayers to deduct their contributions to the

organizations on their tax returns. This Court has already said that both of these benefits—the exemption and the deduction—"are a form of subsidy that is administered through the tax system" because both are effectively "cash grants." *TWR*, 461 U.S. at 544. The upshot under this Court's unconstitutional conditions doctrine is that Congress can—at least sometimes—make § 501(c)(3) status contingent on compliance with speech restrictions. *See id.* at 550–51 (permitting Congress to condition § 501(c)(3) status on *not* engaging in "substantial lobbying," reasoning that organizations could still lobby using an also tax-exempt § 501(c)(4) affiliate and still receive tax-deductible contributions to its non-lobbying activity).

The danger of a decision by this Court supplying government the power to condition receipt of benefits on not just speech restrictions, but also on affirmative speech restrictions, thus comes into focus. It is not a stretch to suggest that upholding the Policy Requirement in this case could allow Congress to force all 501(c)(3) organizations to communicate the government's desired messages as a condition of obtaining and maintaining that status. This would provide the government an end-around for imposing affirmative speech requirements it could not impose directly. For example, Congress could impose a condition on § 501(c)(3) status requiring organizations to:

- adopt a policy stating that they "do not advocate the overthrow of the Government of the United States," *Speiser* 357 U.S. at 515;

- post signs and provide verbal disclaimers that the entity's "status as a § 501(c)(3) organization does not reflect the U.S. government's approval of its message or mission"; or
- if they are a scientific or educational organization, provide disclaimers that their "status as a 501(c)(3) organization does not indicate U.S. government approval of or agreement with its teachings or research."

Maybe none of these affirmative speech requirements seems especially radical, but each of them, like any such requirement, "necessarily alters the content" of each organization's speech and would impermissibly burden freedom of speech if imposed directly. In fact, the first disclaimer is nearly identical to the oath requirement this Court struck down in *Speiser*. The latter two examples are similarly burdensome; they could undermine the public's trust in these organizations at first contact and thus damage their ability to communicate their desired messages.

This sort of law likely would exert even more pressure than the typical funding condition; many already-existing nonprofit organizations likely could not survive without tax-exempt status and charitable contributions from private individuals. Those organizations would be all but forced to speak the government's message, despite the fact that it will "necessarily alter" and quite possibly detract from or even contradict their own message and mission. And unlike the law against § 501(c)(3) lobbying in *Regan*, there would be no way to cure the burden imposed by the affirmative speech requirement with an

alternative channel; once speech is forced, the burden becomes concrete, the bell irrevocably rung.

Imposing an affirmative speech requirement as a condition of § 501(c)(3) status would even burden the speech of organizations that could survive without these tax subsidies. If an organization chose to renounce its § 501(c)(3) status to shake off the affirmative speech requirement, taxpayers could no longer deduct contributions to those organizations. This would surely decrease the overall funding of those organizations; even if taxpayers still chose to contribute, they would likely contribute less because they would lose the benefit of reduced tax liability. As a constitutional matter, restricting funding for protected expression equates to burdening the expression itself because it "necessarily reduces the quantity of expression." *See, e.g. Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 898 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam). In short, an affirmative speech restriction tied to § 501(c)(3) would burden protected speech merely by existing; organizations that elected to remain § 501(c)(3) organizations would be compelled to speak a government message, and organizations that gave up that status to avoid the affirmative speech requirement would likely have to reduce the quantity of their own speech as a consequence.

This potential 501(c)(3) loophole is a large one; it would apply to every religious, educational, charitable, scientific, or literary organization—nonprofits all—that wishes to avail itself of tax-exempt status and receive tax-deductible donations under § 501(c)(3). This includes pregnancy help centers affiliated with *Amicus* and similar

organizations. Pregnancy help centers are almost entirely funded by the charitable giving of private individuals (most do not receive public funding). Yet as a result of receiving even private funds, these centers could be attacked with the very affirmative speech restrictions that their ideological opponents have worked to enact for the past decade.

A second example in the context of the pregnancy help centers underscores the hazards of upholding the Policy Requirement as a permissible compelled-speech funding condition. While these centers run almost entirely thanks to private funding, some centers do receive a portion of proceeds from sales of "Choose Life" license plates available in 30 states. Choose Life America, Inc, http://www.choose-life.org (last visited Apr. 2, 2013) ("[T]he real Choose Life License Plate ... raises funds to support adoption efforts of Crisis Pregnancy Centers, Maternity Homes and not-for-profit adoption agencies."). Thus, a rule that the government may compel speech as a condition of funding would ostensibly allow it to do so here as a backdoor method of burdening the speech of pregnancy help centers. Indeed, Virginia legislators have already tried to tie pregnancy help centers' eligibility for these Choose Life license plate proceeds to disclaimer requirements similar to those discussed above. *See* S. 188, 2010 Gen. Assemb., Reg. Sess. (Va. 2010); H.B. 452, 2010 Sess. (Va. 2010).

Like the hypothetical § 501(c)(3) conditions, a law conditioning receipt of license-plate proceeds on affirmative speech would have secondary viewpoint-based speech-burdening effects, too. The license plates themselves are a form of protected political speech. *See Wooley*, 430 U.S. at 715 (calling a car

with a state-mandated "Live Free or Die" license plate a "'mobile billboard' for the State's ideological message"). Individuals buy these license plates in large part to help support organizations like pregnancy centers that carry out charitable missions they wish to aid. *See* Choose Life America, Inc, http://www.choose-life.org (last visited Apr. 2, 2013) (asking people to buy the plates to support "adoption efforts of Crisis Pregnancy Centers, Maternity Homes and not-for-profit adoption agencies"). If such ordinances forced pregnancy help centers to stop receiving this minor source of funding to avoid a harmful affirmative speech requirement, it would burden these individuals' speech by foreclosing one avenue for that speech, namely their funding of the centers. Moreover, it would reduce individuals' incentive to buy the plates. The quantity of mobile billboards displaying this speech would be significantly reduced as a result.

In sum, by tying these affirmative speech requirements to eligibility for proceeds of expressive license plates, governments could manipulate the market of ideas simply by passing the funding condition: If pregnancy help centers acquiesce to the affirmative speech requirement, they increase the volume and proportion of the government's desired message. If centers choose to drop the funding instead, the government has effected a reduction of the volume and proportion of a potentially undesired message by those private individuals who would otherwise fund the centers and install the plates. Upholding the Policy Requirement in this case would legitimize these sorts of underhanded approaches to attacking the freedom of speech of individuals and nonprofit organizations like pregnancy help centers.

(Indeed, this method of can be extrapolated both to all of the many specialty license plates offered by states that help support nonprofit organizations of all kinds and to other, similar programs.)

The broader point is that public funding is everywhere, and it is often inextricably linked to private expression. Allowing governments to condition public funding of organizations (especially those that seek to communicate political or religious messages) on compliance with affirmative speech requirements could have expansive and troubling consequences for the continued vitality of individual freedom of thought and a marketplace of ideas unfettered by government control and paternalism. The secondary speech-burdening effects of such requirements—*i.e.*, the fact that the incentive these requirements create for an organization to decline public funding could, depending on the way the funding mechanism works, decrease both private speech and private funding of those organizations—are especially concerning.

* * *

For all these reasons, this Court should affirm the Second Circuit's decision, thereby continuing to shield the core political speech of private nonprofits like pregnancy help centers from the serious burdens caused by affirmative speech requirements imposed by the government. "The First Amendment creates an open marketplace in which differing ideas about political, economic, and social issues can compete freely for public acceptance without government interference." *Knox*, 132 S. Ct. at 2288 (internal quotation marks omitted). *Amicus* welcomes open discourse in the marketplace of ideas. It simply asks

for a level playing field not tilted by paternalistic government manipulation of political and religious expression, especially when directed only at certain speakers or viewpoints. Affirmative speech restrictions like the Policy Requirement in this case and those leveled at pregnancy help centers around the country allow just such manipulation by burdening, distorting, and ultimately hijacking the protected expression of private organizations. As this Court has made clear, "the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government." *Riley*, 487 U.S. at 791. *Amicus* asks this Court to affirm the ruling below to stave off proliferation of these invidious requirements.

Respectfully submitted,

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RECORD
AND
BRIEFS

No. 12-10

In The
Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF INDEPENDENT SECTOR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290 (1981) 10, 12

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Elrod v. Burns, 427 U.S. 437 (1976) 7

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FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) 6, 8, 20

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Wooley v. Maynard, 430 U.S. 705 (1977) 7

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OTHER AUTHORITIES

Alexis de Tocqueville, DEMOCRACY IN AMERICA (Phillips Bradley ed., 1990) ..... *passim*

Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 Cornell J.L. Pub. Pol'y 325 (1997) 17

Arnaud C. Marts, PHILANTHROPY'S ROLE IN CIVILIZATION: ITS CONTRIBUTION TO HUMAN FREEDOM (1991) 17

Arthur Schlesinger, PATHS TO THE PRESENT (1949) 13

Carol Jenkins, UNAIDS, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India, and Bangladesh* (2000) 26

CIVIL SOCIETY AND GOVERNMENT (Robert C. Post and Nancy L. Rosenbaum eds., 2002) 16

David Cole, *Hanging With The Wrong Crowd: Of Gangs, Terrorists, and The Right Of Association*, 1999 Sup. Ct. Rev. 203 12

Evelyn Brody and John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 Chi. Kent L. Rev. 571 (2010) 19

THE FEDERALIST NO. 56 (James Madison) (Clinton Rossiter ed., 1961) 13

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Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC (1969) 12

Henry J. Steiner and Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2d ed. 2000) 24

INDEPENDENT SECTOR, *Obedience to the Unenforceable: Ethics and the Nation's Voluntary and Philanthropic Community* (2002) 28, 29

Independent Sector, PANEL ON THE NONPROFIT SECTOR: STRENGTHENING TRANSPARENCY, GOVERNANCE, AND ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS (June 2005) 16, 17

International Federation of Red Cross and Red Crescent Societies, *Code of Conduct for NGOs in Disaster Relief* 24

Joel Fleishman, THE FOUNDATION: A GREAT AMERICAN SECRET: HOW PRIVATE WEALTH IS CHANGING THE WORLD (2007) 1

John H. Filer, *The Filer Commission Report; Report of the Commission of Private Philanthropy and Public Needs*, in THE NONPROFIT ORGANIZATION: THE ESSENTIAL READINGS (David L. Geis et al. eds., 1990) 22

Larry Minear, THE HUMANITARIAN ENTERPRISE, DILEMMAS AND DISCOVERIES (2002) 24

Laurence Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 16

TABLE OF AUTHORITIES – Continued

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Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in THE NONPROFIT SECTOR (Walter W. Powell ed., 1987) 17

Michael M. Phillips and Matt Moffett, *Brazil Refuses U.S. AIDS Funds, Rejects Conditions*, WALL ST. J., May 2, 2005 26

USAID Report, *2006 Report of Voluntary Agencies Engaged in Overseas Relief and Development Registered with USAID*.....22

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Independent Sector is a leadership forum for charities, foundations, corporate giving programs, and nonprofit and non-governmental organizations ("NGOs") committed to advancing the common good in America and around the world. Specifically, Independent Sector is a nonpartisan coalition of approximately 600 organizations primarily based in the United States, whose mission is to lead, strengthen, and mobilize the nonprofit community in order to fulfill its vision of a just and inclusive society and of a healthy democracy of active citizens, effective institutions, and vibrant communities. Independent Sector's members include nonprofit organizations that receive Government and private philanthropic funding, as well as foundations and corporate philanthropies that donate to nonprofits receiving Government funding.

Independent Sector's members comprise an essential element of the "third sector," that part of society that is distinct from Government and business.[2] On behalf of its members, Independent Sector

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the above-mentioned *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See generally* Joel Fleishman, THE FOUNDATION: A GREAT AMERICAN SECRET: HOW PRIVATE WEALTH IS CHANGING THE WORLD

(Continued on following page)

seeks to advise the Court on the fundamental importance of safeguarding the independence and autonomy of this sector. Such associational autonomy is critical to productive cooperation between the Government, the private sector, and the nonprofit sector, and is an animating principle of our constitutional jurisprudence and democratic tradition.

Several of Independent Sector's members and/or members' constituent organizations are United States-based recipients of Leadership Act funds and are thus directly affected by the pledge requirement at issue in this case, 22 U.S.C. § 7631(f). They therefore are required by the Act to adopt a policy expressly opposing prostitution and to cease all activities deemed to be inconsistent with opposition to prostitution, even where those activities are funded wholly by private sources. Each organization receiving such funds has thus been compelled to espouse a particular, Government-sponsored position and to forgo any alternative expression. This unconstitutional condition, placed on the receipt of federal funds, directly interferes with the rights to speak and to associate for the purposes of speaking collectively on matters of public concern. Moreover, the implementing regulations, which set forth stringent requirements for maintaining "organizational integrity" by which recipients must distance themselves from affiliate organizations whose activities and speech might

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52 (2007) (describing charities and foundations as "a powerful third force" in society).

conceivably run afoul of the pledge requirement, are burdensome and inadequate to cure the unconstitutional conditions imposed by the pledge requirement. Finally, by engaging in viewpoint discrimination and compelling members of the third sector to adopt a particular position on a controversial issue – when, in fact, many organizations wish to remain neutral on this issue – the pledge requirement distorts the marketplace of ideas and diminishes the integrity of the third sector.

Independent Sector respectfully urges affirmance of the judgment of the United States Court of Appeals for the Second Circuit, and respectfully submits this brief to explain the importance of preserving the associational independence upon which Independent Sector's member organizations, the third sector as an entirety, and, ultimately, our constitutional democracy, depend.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that the Respondents demonstrated a likelihood of success on the merits of their claim that the pledge requirement of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), violates the First Amendment rights of organizations that receive Leadership Act

funds.[3] Specifically, by mandating that funding recipients adopt "a policy explicitly opposing prostitution," 22 U.S.C. § 7631(f), and otherwise prohibiting them from engaging in activities "inconsistent" with that policy, *e.g.*, 45 C.F.R. § 89.3, the Leadership Act's pledge requirement compels funding recipients to affirmatively express a particular viewpoint favored by the Government and, thus, exceeds the bounds of permissible Government action. *See Alliance for Open Soc'y Int'l, Inc. v. USAID ("AOSI")*, 651 F.3d 218, 230-39 (2d Cir. 2011). Furthermore, by placing these unconstitutional conditions on the receipt of Leadership Act funds, the pledge requirement not only contravenes principles upon which our democracy rests, but also undermines the strength and vitality of the longstanding and productive partnership between Government and civil society. As set forth in further detail below, it does so in three ways.

First, the pledge requirement violates the First Amendment rights of Leadership Act grantees by conditioning access to government funds on the adoption of a particular government viewpoint and waiver of the First Amendment right to use private funds to engage in constitutionally protected speech.

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[3] Because this case comes before the Court following the Court of Appeals' affirmance of a grant of a preliminary injunction, *see Alliance for Open Soc'y Int'l, Inc. v. USAID*, 570 F. Supp. 2d 533, 545-46 (S.D.N.Y. 2008), *aff'd*, 651 F.3d 218, 230 (2d Cir. 2011), the constitutional claim in this case is subject to the likelihood-of-success standard, *see Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (per curiam).

Thus, the pledge requirement restricts the ability of organizations to speak freely and independently on matters of concern to them and to undertake expressive activity to that end.

Second, the pledge requirement contravenes the independence and autonomy of nonprofit organizations and private voluntary associations to speak freely on matters of public concern, the value of which has been recognized time and again by this Court and has been a critical feature of this nation's history. By interfering with the third sector's independence and autonomy, the pledge requirement compromises the salutary benefits – including safeguarding minority rights, fostering diversity and pluralism, and encouraging innovation – that nonprofit organizations and other voluntary associations provide.

Third, the pledge requirement violates the integrity and undermines the autonomy of the third sector in general and of Independent Sector's members in particular. Independence is a critical feature of these organizations' ability to effectively partner with Government and provide innovative approaches to addressing urgent social problems at home and abroad. The pledge requirement, by requiring adherence to a specific viewpoint by entire entities, stifles divergent viewpoints, and interferes with nonprofit and philanthropic activity.

ARGUMENT

I. THE PLEDGE REQUIREMENT IMPOSES UNCONSTITUTIONAL CONDITIONS ON THE FIRST AMENDMENT FREEDOMS OF NONPROFIT AND PHILANTHROPIC ORGANIZATIONS.

The pledge requirement places conditions on the receipt of federal funds in violation of the First Amendment. Specifically, the Leadership Act engenders an unconstitutional condition by, first, requiring that the entity receiving federal funds adopt a particular viewpoint – that is, the viewpoint espoused by the Government – as a condition of receiving such funds; and, second, by mandating that recipient organizations forgo certain speech, even when that speech is funded by non-governmental sources. As the Court of Appeals correctly concluded, the pledge requirement amounts to viewpoint discrimination that must be subjected to heightened scrutiny, which it ultimately fails. *See AOSI*, 651 F.3d at 230-39.

Under the unconstitutional conditions doctrine, the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Thus, this Court has held that Government may not condition eligibility for a property tax exemption on a taxpayer's oath of loyalty to the United States, *see Speiser v. Randall*, 357 U.S. 513 (1958); may not condition funding for noncommercial broadcasting on stations' editorial content, *see FCC v.*

League of Women Voters of Cal., 468 U.S. 364 (1984); and may not condition funding for legal services on an attorney forgoing certain constitutional and statutory claims on behalf of his client, *see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). Further, this Court has consistently rebuffed attempts by Government to compel private individuals or organizations to pledge support for a particular policy or viewpoint as a condition of participating in a Government program. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (refusing to permit cancellation of a trash hauling contract because contractor had vigorously criticized local government); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (invalidating removal of a tow truck operator from municipality's rotation list as a penalty for refusing to support mayor's re-election); *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking law conditioning state residents' use of road on display of State motto on license plates); *Elrod v. Burns*, 427 U.S. 437 (1976) (holding that public employee's continued employment could not be conditioned on his political party affiliation); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (declaring unconstitutional requirement that children recite pledge of allegiance as condition of attending public school); *cf. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61-62 (2006) (upholding law requiring schools receiving federal funding to permit military recruiting on campus because that condition did not "approach[ ] a Government-mandated pledge or motto that the school must endorse"). This Court

has also refused to allow the Government to condition access to funding on a waiver of the First Amendment right to use private funds to engage in constitutionally protected speech. *See League of Women Voters*, 468 U.S. at 400-01 (striking federal funding condition that did not permit recipient "to segregate its activities according to the source of its funding").

The Leadership Act, however, specifically forces nonprofit and philanthropic organizations to pledge support for a particular Government policy as a condition of qualifying for the receipt of federal funds. Thus, this provision expressly conditions access to Government funding on the forfeiture of free expression and the adoption of a particular viewpoint. But "[c]ompelling speech as a condition of receiving a Government benefit cannot be squared with the First Amendment," *AOSI*, 651 F.3d at 234, especially where the compelled speech "requires recipients to take the government's side on a particular issue," *id.* at 235. This is especially so where, as here, the Government places the expressive restriction on recipient nonprofit and philanthropic organizations as a whole, thus prohibiting contrary expressive activity even outside of the confines of the federally funded program. *See League of Women Voters*, 468 U.S. at 400-01. The pledge requirement therefore deprives the public of truly independent voices, skews the marketplace of ideas towards the Government's favored position, and is anathema to our constitutional tradition and this Court's settled jurisprudence. Accordingly, it must be invalidated.

II. THE PLEDGE REQUIREMENT UNDERMINES THE THIRD SECTOR'S INDEPENDENCE AND AUTONOMY, A VALUE ENSHRINED IN THIS COURT'S CONSTITUTIONAL JURISPRUDENCE AND IN THIS NATION'S HISTORY

The vitality, diversity, and abundance of voluntary associations and non-governmental institutions constitute a central pillar upon which American democracy rests. Further, the speech engaged in by private voluntary associations, such as nonprofit and philanthropic organizations, fulfills a critically important function in a democratic society. Such speech lessens the authority of the majority, serves as a bulwark against the power of the state, and enables individuals to more powerfully and effectively advance diverse and competing views in the marketplace of ideas. As this Nation's history shows and as is enshrined in our constitutional jurisprudence, in order to carry out these critical functions, such private associations must maintain their independence from the state. By suppressing these associations' speech and affirmatively requiring them to espouse a particular view – even when they wish to remain neutral or in fact hold an opposite or nuanced view – as a condition of receiving federal funding, the pledge requirement undermines the associational independence and autonomy at the heart of the American democratic system. While nonprofit and philanthropic organizations often partner with the Government, this valuable partnership need not – and indeed,

must not – compromise the associational and expressive autonomy and independence of the third sector.

That associational activity and the collective expression of shared beliefs and viewpoints lie at the core of the First Amendment's protections cannot be gainsaid. Voluntary association is an essential aspect of the freedom of speech memorialized in the Constitution, U.S. CONST. amend. I, and this Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *accord Christian Legal Soc. Chapter of Univ. of Calif., Hastings College of Law v. Martinez*, 130 S. Ct. 2971, 2985 (2010). This right of association is a right to speak collectively on matters of public concern, and the Constitution jealously guards that freedom precisely because it guarantees "'the right of people to make their voices heard on public issues,'" especially where, "'individually, their voices would be faint or lost.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982) (quoting *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294-95 (1981)). *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of

speech and assembly."). Freedom of association is therefore protected as a fundamental component of our personal liberty. Indeed, "[t]he most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of Association therefore . . . is as inalienable in its nature as the right of personal liberty." Alexis de Tocqueville, DEMOCRACY IN AMERICA 117 (Phillips Bradley ed., 1990).[4] Of course, corporate

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[4] Although the lower courts focused on the effect of the Leadership Act on recipients' speech, the First Amendment protection afforded associational rights – namely, the freedom to advocate *collectively* in favor of a particular viewpoint – further supports the Court of Appeals' conclusion that the regulation here at issue should be subjected to heightened scrutiny. *See Patterson*, 357 U.S. at 460-61 ("State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (holding that encroachment on associational right must be justified by compelling reason). This Court has repeatedly struck down state action which curtails or distorts associational expression, including penalizing or withholding benefits from individuals because of their membership in a disfavored group, mandating disclosure of membership rolls, and interfering with groups' internal organization or affairs. *See Roberts*, 468 U.S. at 622-23. *See also Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that right of expressive association trumps state public accommodations law); *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1974) (holding that associations have right to be free from state interference with the internal structure of the organization); *Gibson v. Fla. Legislative Investigation Comm.*, 371 U.S. 539 (1963) (contempt conviction for refusal to divulge information in local NAACP membership lists violated right of association); *Shelton v. Tucker*, 364 U.S. 479 (1960) (statute compelling

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bodies, including nonprofit and philanthropic organizations, benefit from the protections that this constitutional tradition affords. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 342-43 (2010).

As an historical matter, "'the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.'" *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)). Indeed, American life has long been characterized by vigorous associational activity. "Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world." DEMOCRACY IN AMERICA at 113. "In their political associations the Americans of all conditions, minds, and ages, daily acquire a general taste for association and grow accustomed to the use of it. There they meet together in large numbers, they converse, they listen to one another, and they are mutually stimulated to all sorts of undertakings." *Id.* at 129. *See also* Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 186-96, 319-28 (1969) (associations have been a distinctive feature of American life from the earliest days of the Republic); David Cole, *Hanging With The Wrong Crowd: Of Gangs, Terrorists, and The Right Of Association*, 1999 Sup.

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teachers to file affidavit organizational affiliation invalid on the grounds of associational freedom).

Ct. Rev. 203 ("Traditionally, Americans have distrusted collective organization as embodied in government while insisting upon their own untrammeled right to form voluntary associations." (quoting Arthur Schlesinger, PATHS TO THE PRESENT 23 (1949))). Indeed, associational activity was extolled by the Framers as a critical manner by which to maximize the power of the people and minimize the dangers of centralized government. *See* THE FEDERALIST NO. 56, at 53 (James Madison) (Clinton Rossiter ed., 1961) (describing the virtues of voluntary private association as minimizing the dangers attendant to centralized power).

This Court has long upheld this tradition by unwaveringly safeguarding the autonomy and independence of nonprofit and philanthropic organizations, in particular, in other strands of jurisprudence outside the First Amendment context. Thus, in the foundational case *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall observed that the mere incorporation of Dartmouth College, a private, charitable educational institution, did not render it an arm of the State of New Hampshire, but instead amounted to a private contract that transferred assets from the original donors to the corporation, *id.* at 644, and that New Hampshire could not impair, *id.* at 650. Courts likewise have been careful to maintain the distinction between private nonprofit and philanthropic organizations and public entities, *see, e.g.*, *Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 938 (7th Cir.

2004) (concluding that trust created by statute was independent of the State), and have only determined that such organizations are state actors in very limited circumstances, *see, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Ass'n*, 531 U.S. 288, 295 (2001) (describing "close nexus" that must exist between state and private association to bring association's action within Fourteenth Amendment); *Jackson v. Statler Found.*, 496 F.2d 623, 639 (2d Cir. 1974) (Friendly, J., dissenting from denial of rehearing *en banc*) ("[C]ourts should pay heed . . . to the value of preserving a private sector free from the constitutional requirements applicable to government institutions." (internal quotation marks omitted)). Further, because the third sector is autonomous, this Court has consistently held that Government funding to nonprofit, faith-based organizations does not, by itself, compel the conclusion that the Government has engaged in constitutionally impermissible espousal or establishment of religion. To the contrary, in order to raise Establishment Clause concerns, this Court has required additional facts indicating that the Government did not neutrally administer such aid, but specifically intended to subsidize religious activity by funding groups that operate independently of any public body. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 809 (2000); *Agostini v. Felton*, 521 U.S. 203, 229-32 (1997); *Walz v. Tax Comm'r*, 397 U.S. 664, 673-74 (1970).

Without question, our constitutional democracy has been and continues to be well served by protecting the third sector's independence and autonomy. To

begin, the right of nonprofit and philanthropic organizations to associate free of Government interference lessens the authority of the majority and strengthens the minority. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000) (characterizing right of expressive association as "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"); *Roberts*, 468 U.S. at 622 ("According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."); *Patterson*, 357 U.S. at 462. As De Tocqueville observed, "[i]n America, the citizens who form the minority associate in the first place to show their number and lessen the moral authority of the majority." DEMOCRACY IN AMERICA 117.

Second, maintaining nonprofit and philanthropic organizations' independence and autonomy encourages "political and cultural" diversity and gives voice to our "abiding commitment to pluralism." *Patterson*, 357 U.S. at 277-78. As Justices Brennan and Powell separately observed, a signal virtue of the third sector is its unique contribution "to the pluralism of American society" and "diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." *Walz*, 397 U.S. at 689 (Brennan, J., concurring); *accord Bob Jones Univ. v. United States*, 461 U.S. 574, 609 (1983) (Powell, J., concurring) ("Far from representing an effort to reinforce any perceived 'common community conscience,' the provision of tax

exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life."). Indeed, associational life provides the participants in the third sector with "socialization into the political values necessary for self-government" in a diverse, pluralistic society. CIVIL SOCIETY AND GOVERNMENT 18 (Robert C. Post and Nancy L. Rosenbaum eds., 2002).

Third and finally, the right of expressive association protects against tyranny and serves as a bulwark against centralized power. "Despotism, by its very nature suspicious, sees the isolation of men as the best guarantee of its own permanence." DEMOCRACY IN AMERICA 119; Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 1313 (2d ed. 1988) ("[T]o destroy the authority of intermediate communities and groups . . . destroys the only buffer between the individual and the state."); *cf. DeJonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (reasoning that First Amendment associational rights ensure that "government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means"). The third sector thus serves as a "center of collective political resistance against capricious and oppressive government." CIVIL SOCIETY AND GOVERNMENT at 18.

Today, the third sector is flourishing under these independent and autonomous conditions: nearly half of all adults volunteer each year, and nine out of ten households make charitable contributions, towards diverse causes. Independent Sector, PANEL ON THE

NONPROFIT SECTOR: STRENGTHENING TRANSPARENCY, GOVERNANCE, AND ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS 9 (June 2005). The resulting free interplay of numerous viewpoints has led to the incubation of new ideas by private associations that now seem commonplace, including, as just one powerful example, the 9-1-1 emergency response system. *Id.* at 10. Charitable organizations have also been the partners through which the Government effectively and efficiently delivers services such as early childhood education programs, health clinics, drug counseling, and after-school programs. *Id.* at 11; *see also* Arnaud C. Marts, PHILANTHROPY'S ROLE IN CIVILIZATION: ITS CONTRIBUTION TO HUMAN FREEDOM 50 (1991) (noting that this sector has pioneered almost every cultural advance for the past three hundred years); Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 Cornell J.L. Pub. Pol'y 325, 332 (1997); Lester M. Salamon, *Partners in Public Service: The Scope and Theory of Government-Nonprofit Relations*, in THE NONPROFIT SECTOR 99 (Walter W. Powell ed., 1987). Indeed, as the district court aptly observed below:

> [T[he far-reaching role of NGOs in presenting issues of concern to governmental officials, as well as contributing to public debate on contested social issues, in influencing the course of public policy as well as in enhancing core public values and safeguarding them from government abuse, has always been critical to our democracy. From the beginning

> of the Republic to this day, as Congress itself recognized in the Act, NGOs have played a significant role as partners of government in administering vital public services. They promote fuller participation and a diversity of views in civil society. They have served as advocates of public causes as voices for the marginalized, disenfranchised and impoverished, and as counterweight to the more powerful interests in our society, both as friends and as adversaries of the government. They engage in conducting public forums to disseminate information, opinions and advice on issues before the government, a function that is critical to an informed citizenry. Quite simply, public interest groups have resources and capabilities that individuals, acting alone, do not. . . .

Alliance for Open Soc'y Int'l, Inc. v. USAID, 430 F. Supp. 2d 222, 262-63 (S.D.N.Y. 2006).

It follows that the Government must not be permitted to supervise or manage nonprofit and philanthropic associations or to interfere with their free speech "lest their independent influence on society be diluted" and the marketplace of ideas be stifled. DEMOCRACY IN AMERICA 115-119, 312. Indeed, attempts to bring the third sector under the control of the Government will inevitably discourage participation of the public in private associations. As this Court warned nearly two centuries ago, governmental obstruction of nonprofit and philanthropic autonomy threatens to undermine charitable giving and deprive

American society of the great value that the third sector provides. *See Dartmouth College*, 17 U.S. (4 Wheat.) at 647 (Marshall, C.J.) ("It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that . . . [its] funds are to be governed and applied, not by the will of the donor, but by the will of the legislature."); *id.* at 671 (Story, J., concurring) (1819) (predicting that conflation of private charities with governmental entities "would extinguish all future eleemosynary endowments"). As should be obvious, "[t]he interest in preserving an area of untrammeled choice for private philanthropy is very great," *Jackson*, 496 F.2d at 639-40 (2d Cir. 1974) (Friendly, J., dissenting from denial of rehearing *en banc*), because the third sector's independence and autonomy preserves the constitutional and historical values of free expression and pluralism, and prevents the "loss of innovative solutions to social problems" that would inhere if nonprofit and philanthropic organizations were unable to pursue their chosen missions, Evelyn Brody and John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 Chi. Kent L. Rev. 571, 615 (2010).

This is not to say, and *amicus* does not contend, that there can be no laws governing this sector; rather *amicus* only contends that the Government must not interfere with private associations in a manner that compromises their independence, and with it, their salutary function in society. That is because it is its independence from Government

interference that enables the third sector to serve this critical function. As the district court stated below, "The diversity and breadth of the traditional public functions NGOs contribute to our society should rank the quality of First Amendment rights and protection they merit to no lesser degree than that accorded to editorial opinion or to universities." *AOSI*, 430 F. Supp. 2d at 262-63. While Government should, and commonly does, partner with private associations, and while it is certainly appropriate for Government to shape and tailor *its* funding to serve the purposes it wishes, it is not permissible for the Government to use funding to compel the entities with which it partners, many of which receive much of their funding from other sources, to espouse particular positions, whether they adhere to them or not. *See League of Women Voters*, 468 U.S. at 400 (invalidating federal condition prohibiting broadcaster from all editorializing, even if 99% of that broadcaster's income derived from private or non-federal sources). Accordingly, the Court of Appeals properly invalidated the pledge requirement, which exceeds the bounds of permissible Governmental funding conditions and is inconsistent with the constitutional and historical traditions of nonprofit and philanthropic organizations' independence and autonomy from Government. *See AOSI*, 651 F.3d at 230-39.

III. THE PLEDGE REQUIREMENT UNDERMINES THE VALUABLE PARTNERSHIP BETWEEN GOVERNMENT AND THE THIRD SECTOR.

Requiring those members of Independent Sector members that receive Leadership Act funds to satisfy the pledge requirement and to cease all contrary speech is in impossible tension with this Court's jurisprudence and our nation's history, and, as the Court of Appeals held, compromises Leadership Act grantees' free speech, as well as the rights of their members to associate for the purposes of collective expression. Equally troubling, the pledge requirement undermines the independence of the third sector and, thus, the crucial partnership between Government and civil society. And it further deprives the public of independent voices, while creating the misleading impression that a chorus of independent voices endorses a single viewpoint – that of the Government.

Private associations have long provided critically needed services in concert with Governmental programs and entities and have assisted the Government in solving pressing social problems. But the success of this partnership has hinged on the independence of the third sector from Governmental control. Without such independence and autonomy, the creativity and innovation that define this sector would be muted and the number of valuable contributions to American life would decrease dramatically. After all, the organized efforts of the third sector to abolish slavery,

protect civil rights, and create public libraries all depended upon the independence of private, voluntary associations that arose in order to bring about these results. *See* John H. Filer, *The Filer Commission Report; Report of the Commission of Private Philanthropy and Public Needs*, in THE NONPROFIT ORGANIZATION: THE ESSENTIAL READINGS 70, 80 (David L. Geis et al. eds., 1990). It is precisely their independence from Government control – and their corresponding freedom to innovate and effect change – that enables the third sector to effectively partner with the Government. Indeed, elsewhere Congress has recognized the importance of relying on the third sector to achieve development objectives abroad "without compromising their private and independent nature." Foreign Assistance Act, 22 U.S.C. § 2151u. And Petitioner USAID has itself "recognize[d] the independent mission" of the third sector, and has acknowledged that one "inherent challenge" "is achieving the right mixture of collaboration and independence between public and private spheres. A healthy degree of separation between the two is essential for the unique mission of each, but cooperation is also critical to the success of both." USAID Report, *2006 Report of Voluntary Agencies Engaged in Overseas Relief and Development Registered with USAID* 4.

Here, the pledge requirement directly compromises the independence and autonomy of Independent Sector's member-organizations that receive Leadership Act funds; it thereby cripples their valuable

partnership with Respondents – a point that the Government's brief fails to appreciate. The Government reasons that, by accepting Leadership Act funds, members of the third sector simply become the Government's "faithful agents" who may not frustrate Congress's express aim of eliminating HIV/AIDS by eradicating sex work. Pet'rs Br. 32. But one of the fundamental flaws of the pledge requirement is that it compels the grantee as an entity, rather than merely as the administrator of a particular project, to adopt a governmental viewpoint that it would otherwise not express, and "to do so as if it were their own." *AOSI*, 651 F.3d at 237. In other words, a recipient organization is unable to maintain silence regarding its views as to sex work and is not permitted to indicate that any professed views regarding sex work are strictly those of its grantor. This exceeds the bounds of funding conditions on the third sector that this Court previously tolerated in *Rust v. Sullivan*, 500 U.S. 173 (1991), where the Governmental funding condition specifically did not compel a recipient "to represent as his own any opinion that he does not in fact hold," or otherwise require the recipient to adopt a particular viewpoint on a contested social matter. *Id.* at 200. Rather, by requiring the *grantee*, and not the *project*, to affirmatively adopt this policy, *see id.* at 196, the Government here has "stepped beyond what might have been appropriate to ensure that its anti-prostitution message would not be 'garbled' or 'distorted,'" *AOSI*, 651 F.3d at 237 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

The pledge requirement thus attacks the third sector's associational freedom and the diversity of viewpoints that it engenders. It also impedes the third sector's functioning by compelling nonprofit and philanthropic organizations to take the Government's side in an ongoing societal debate. For example, as a matter of best practices, many NGOs adopt a principle of impartiality in providing humanitarian relief and assistance. Specifically, the Code of Conduct for NGOs in Disaster Relief provides that "[a]id not be used to further a particular political or religious standpoint," and that such agencies "act independently from governments." *See* International Federation of Red Cross and Red Crescent Societies, *Code of Conduct for NGOs in Disaster Relief* arts. 3, 4; *see also* Larry Minear, THE HUMANITARIAN ENTERPRISE, DILEMMAS AND DISCOVERIES 76-80 (2002) (describing the importance of impartiality to international relief organizations and the way in which independence from state governments enables them to carry out their "humanitarian imperative"); Henry J. Steiner and Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 943-52 (2d ed. 2000). According to these principles, humanitarian assistance, in order to be effective, must not be linked to any political or religious viewpoint. *See id.* In part, this is so because of the danger attendant to operating in a conflict situation in which the organization is deemed to be an agent of any one side. *See* THE HUMANITARIAN ENTERPRISE 117-18, 161-65 (describing the dangers of humanitarian operations in unstable and war-torn countries as well as the dangers of being

perceived by the population to be served as affiliated with a participant in the conflict). Thus, in many instances, NGOs depend upon their independence from the Government and state actors in order to carry out their work effectively, by, for example, serving communities that might otherwise be wary of receiving assistance from Government or State actors. This purpose is undermined by the requirement of a pledge that inexorably links them to a particular side of an ongoing conflict or debate.

The values of independence, neutrality, and integrity are especially critical to the success of nonprofit and philanthropic organizations operating internationally. Recipients of Leadership Act funds, for example, operate in regimes that vary with respect to the legality of sex work. Thus, sex work is not criminalized in countries such as Senegal and Brazil. *See* Decl. of Chris Beyrer ¶¶ 20, 27, *AOSI*, No. 05-cv-8209 (S.D.N.Y. Sept. 28, 2005), ECF No. 3-4 (describing the success of Senegal in combating the spread of HIV/AIDS by decriminalizing sex work for sex workers registered with the Government, and noting that, due to the decriminalization of sex work in Brazil, outreach programs have been successful in reducing the rate of HIV). Likewise, in the Philippines, sex workers must register with the Government. *See id.* ¶ 26. In these and other countries in which sex work is not criminalized, United States based NGOs may and frequently do wish to provide public health assistance or to subcontract with others to provide such assistance, in order to stop the spread of

HIV/AIDS. In these countries and others, adopting the position of the United States Government will likely undermine the work of these organizations and hamper their ability to operate. *Accord* Carol Jenkins, UNAIDS, *Female Sex Worker HIV Prevention Projects: Lessons Learnt from Papua New Guinea, India, and Bangladesh* 52 (2000) (identifying strong relationships with target group predicated on non-stigmatization as key to program success). In illustration of this point, the Brazilian government, which runs a highly successful HIV/AIDS prevention program, returned $40 million in grants from the United States on the ground that its ability to conduct effective outreach to sex workers would be undermined if their NGO partners were forced to state their explicit opposition to prostitution. *See* Michael M. Phillips and Matt Moffett, *Brazil Refuses U.S. AIDS Funds, Rejects Conditions*, WALL ST. J., May 2, 2005 at A3.

Moreover, the Government itself recognizes that neutrality and independence are often prerequisites to the effective work of NGOs operating internationally. For even as it becomes increasingly clear that sponsoring international relief and development stands to further the national security of the United States, *see* 22 C.F.R. § 226 *et seq.* (implementing requirement that all USAID program materials be marked as "from the American people"), so too is it recognized, even by the Government, that in some instances, conferring Government identity on NGOs threatens their effectiveness. Thus, by their terms, the branding requirements of USAID do not apply if

they would "compromise the intrinsic independence or neutrality of a program," "diminish the credibility" of reports or recommendations, or "offend local cultural or social norms." 22 C.F.R. § 226.91(h)(1) (listing presumptive exceptions to branding requirement).

Finally, the pledge requirement threatens the vitality of nonprofit and philanthropic organizations by subverting the values of transparency and accountability upon which public trust and participation in the third sector is predicated. As the above examples illustrate, third sector organizations regularly distinguish themselves specifically as non-governmental identities, as a result of which the affected populations do not attribute their actions or viewpoints to the Government. Indeed, in other contexts, Petitioners themselves have recognized as much. For example, in 2004, Petitioner USAID promulgated a rule removing certain barriers to the participation of faith-based agencies in USAID programs. *See* 69 Fed. Reg. 61,716 (Oct. 20, 2004). In order to avoid any violation of the Establishment Clause of the United States Constitution, faith-based agencies are eligible for USAID funding so long as the funding at issue is not used by those agencies for "inherently religious activities." *Id.* at 67,717. The rule recognizes that "a religious organization that participates in USAID programs *will retain its independence* and may continue to carry out its mission, including the definition, practice, and *expression* of its religious beliefs, provided that it does not direct financial assistance from USAID to support any inherently

religious activities." *Id.* (emphases added). Thus, even the Government accepts that third sector organizations are not only independent, but hold themselves out to the public as independent, autonomous entities. And, even more, in this example the Government recognized that creating "firewalls" between government-funded services and religious activities of a grantee recipient, such as accounting procedures distinguishing publicly and privately funded activities, was "more than sufficient" to maintain recipient organizations' independence, while still ensuring that public funds were being put toward their intended uses. 69 Fed. Reg. at 61,721. Mandating that recipient organizations adopt a Government policy was therefore unnecessary, in addition to being unsound.

Principles of transparency dictate that third sector organizations ensure that all representations made in promotional, fundraising, and other documents reflect the underlying values and mission of the organization. *See* INDEPENDENT SECTOR, *Obedience to the Unenforceable: Ethics and the Nation's Voluntary and Philanthropic Community* 20-21 (2002). The pledge requirement and USAID's corresponding guidance on the formation of affiliates forces third sector organizations into an untenable position: they must adopt a policy that does not reflect the views of their members as if it were their own, and thus either abandon certain activities that would otherwise be within their mission or create affiliate organizations that in fact obscure their structure and activities. That the Government anticipates and accepts such

duplicity, *see* Pet'rs Br. 48 (advocating that organizations seeking to maintain neutral or conflicting position may "form affiliates whose sole purpose is receiving and administering HIV/AIDS funding"), does not lessen the deleterious impact of such practices. In addition to incurring unnecessary and non-negligible administrative costs, creating disingenuous affiliate structures violates a key tenet of the third sector: "Accountability to the public is a fundamental responsibility of public benefit organizations; openness and honesty in reporting, fundraising and relationships with all constituencies are essential behaviors for organizations which seek and use public or private funds and which purport to serve public purposes." *Obedience to the Unenforceable* at 18.

Ultimately, in the face of the pledge requirement at issue in this case or like requirements, partnerships between the Government and public sector will be less effective as NGOs are forced to choose between adopting policies that may severely hamper their legitimacy and effectiveness or forgoing Government funds altogether. As the district court noted, NGOs such as plaintiffs in this case play a "critical role" in "stimulating public discourse on controversial issues, including eminently debatable questions such as what may be the most appropriate or effective policy to engage high-risk groups in [combating the HIV/AIDS pandemic]." *AOSI*, 430 F. Supp. 2d at 263. Third sector organizations will find it difficult if not impossible to experiment with new views and approaches to addressing the HIV and AIDS pandemic

if forced to adhere to the restrictions of the pledge requirement. As the district court warned,

> [T]he government's intervention would carry the substantial likelihood to redirect the choice of speech that a recipient might otherwise feel entirely uninhibited to make, and by the use of such inducements derived from its vast resources, to tilt the public power equilibrium to the choice of view the government elects to favor.

Id. at 258.

It is not only the third sector organizations that stand to lose in such a scenario. Without the vital independence of these organizations, and the diversity of views engendered by that independence, the Government is left to partner only with its ideological bedfellows, and is consequently deprived of the robust exchange of ideas that lead to innovative approaches to solving pressing social problems. *Cf. Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (observing that, in invalidating regulation of speech in university context, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection") (internal quotation marks omitted)). Our history bears witness to the substantial benefits that would be lost thereby; our future cannot afford such consequences.

CONCLUSION

The pledge requirement has the effect of undermining the critical partnership between Government and civil society, which has served as a cornerstone of our democracy. Without maintaining its autonomy, the ability of the third sector to work together with Government to provide essential services and to solve urgent public problems is severely compromised. Efforts to compel members of the third sector to adopt a single viewpoint favored by Government will distort the independent voices of the third sector, and will ultimately deprive our democracy of the fruits of the third sector's robust autonomy.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Dated April 3, 2013

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No. 12-10

IN THE

Supreme Court of the United States

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, *et al.*,

Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. § 7631(f), which requires an organization to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.

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Cited Authorities

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Riley v. Nat'l Fed'n for the Blind,
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MISCELLANEOUS

Caroline Hoxby, *School Choice and School Productivity (Or, Could School Choice be a Tide That Lifts All Boats?)*, National Bureau of Economic Research Working Paper No. 8873 (April 2002), *available at* http://www.nber.org/papers/w8873 23

Catalog of Federal Domestic Assistance, https://www.cfda.gov/ (last viewed Mar. 31, 2013) 21

Cybersecurity Act of 2012, S. 3414, 112th Cong. (2012) §§ 301-04 23

David B. Muhlhausen, *Fire Grants: Do Not Reauthorize an Ineffective Program* 1 (Heritage Foundation 2012), *available at* http://www.heritage.org/research/reports/2012/11/fire-grants-do-not-reauthorize-femas-ineffective-program 21

Elisa Morgera et al., U.N. Food & Agric. Org., *Organic Agriculture and the Law* v (2012), *available at* http://www.fao.org/organicag/oa-publications/pub-cat/sustainability-and-perspectives/en/.....5

Elizabeth T. Boris et al., *Human Service Nonprofits and Government Collaboration: Findings from the 2010 National Survey of Nonprofit Government Contracting and Grants* (2010), *available at* http://www.urban.org/publications/412228.html 21

Cited Authorities

Page

FDA, *Guidance for FDA Staff: The Leveraging Handbook* 5 (2003), *available at* http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/WhatWeDo/UCM121662.pdf 22

FDA, Public-Private Partnership Program, Biomarker Consortium, http://www.fda.gov/AboutFDA/Partnerships Collaborations/PublicPrivatePartnershipProgram/ucm231115.htm 22

Garima Malhotra, *Good Intentions, Bad Consequences: How Congress' Efforts to Eradicate HIV/AIDS Stifle the Speech of Humanitarian Organizations*, 61 Cath. U. L. Rev. 839 (2012) 14

Goldie Blumenstyk, *For-Profit Colleges Show Increasing Dependence on Federal Student Aid*, The Chronicle of Higher Education (Feb. 15, 2011) *available at* http://chronicle.com/article/For-Profit-Colleges-Show/126394/ 21

Grants.gov, http://www.grants.gov/applicants/recovery.jsp (last viewed Apr. 1, 2013).....20

Helen Norton, *Government Speech in Transition*, 57 S.D. L. Rev. 421 (2012) 11

Cited Authorities

Page

Jeff Walker, Economic Sanctions: United States Sanctions Against South Africa – Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986), 28 Harv. Int'l L.J. 117 (1986) 25

John W. Whitehead, *America's Dark Side: Sexual Trafficking of Women* (Mar. 8, 2004), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/americas_dark_side_sexual_trafficking_of_women 2

John W. Whitehead, *The Evil Flesh Trade in Young Children* (Sept. 30, 2002), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/the_evil_flesh_trade_in_young_children 2

Johns Hopkins Children's Center, *2011: Media and Adolescent Substance Abuse* (Mar. 16, 2011), http://www.hopkinschildrens.org/media-and-adolescent-substance-abuse.aspx 25

Mandiant, *APT1: Exposing One of China's Cyber Espionage Units* (2013), *available at* http://intelreport.mandiant.com/ 24

Nat'l Conference of State Legislatures, *Possession of a Firearm by the Mentally Ill* (Jan. 2013), http://www.ncsl.org/issues-research/justice/possession-of-a-firearm-by-the-mentally-ill.aspx 5

Cited Authorities

Page

NYC Human Resources Administration Department of Social Services, *Think Being a Teen Parent Won't Cost You? http://www.nyc.gov/html/hra/html/programs/teen_pregnancy_campaign.shtml* (last visited Mar. 31, 2013) 4

Office of National Drug Control Policy, *What Americans Need to Know about Marijuana* 2 (2011), *available at* www.ncjrs.gov/ondcppubs/publications/pdf/mj_rev.pdf 23

U.S. Gov't Accountability Office, GAO-11-478, *Grants.gov: Additional Action Needed to Address Persistent Governance and Funding Challenges* (2011) 20

U.S. Gov't Accountability Office, GAO-11-773T, *Federal Grants: Improvements Needed in Oversight and Accountability Processes* (2011). . . . 20

U.S. Dep't of Health & Human Servs., *The Leveraging Handbook: An Agency Resource for Effective Collaborations* (2003) 21-22

United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003: Markup Before the H. Comm. on Int'l Relations, 108th Cong. 77 (statement of Rep. Smith, Vice Chairman, H. Comm. on Int'l Relations). 14

INTEREST OF *AMICUS CURIAE*

Amicus curiae the Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened, and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions.[1]

The Rutherford Institute works to preserve the most basic freedoms of our Republic. Perhaps the most important of these freedoms is the right to be free from government interference with the beliefs one holds and the positions one espouses. This central freedom is the bedrock on which the First Amendment rests.

While Congress has authority to control the ways in which federal dollars are used by private recipients, this case goes far beyond that power. The Rutherford Institute filed an *amicus* brief in *Rust v. Sullivan*, 500 U.S. 173 (1991), arguing—correctly—that Congress may prohibit the use of federal funds to perform or advocate the performance of abortions without running afoul of

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1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk of this Court.

the First Amendment. This case is not like *Rust*. Not content with *proscribing* activity and speech that could undermine the Leadership Act, the government claims the right to force grant recipients to internalize and adopt *as their own* a government view on virtually any issue that it deems relevant to a broader program agenda, and (most remarkably) to do so with virtually no First Amendment scrutiny.

This case involves forcing private entities to take a position opposing prostitution and sex-trafficking, scourges the Rutherford Institute abhors.[2] The relatively uncontroversial content of this policy should not obscure what is at stake. The Rutherford Institute is troubled by the government's attempt to seize power to control private speech and belief, through a virtually limitless Spending Clause authority and a dramatic expansion of the government speech doctrine. The power claimed by the government to require express policy agreements, free from First Amendment scrutiny, is novel. It would authorize all manner of forced statements of belief so long as they are attached to government spending. In an era of increasing government reach, the government must show more than expedience in order to compel professed loyalty to its preferred views.

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2. *See, e.g.*, John W. Whitehead, *America's Dark Side: Sexual Trafficking of Women* (Mar. 8, 2004), https://www.rutherford.org/publications_resources/john_whiteheads_commentary/americas_dark_side_sexual_trafficking_of_women; John W. Whitehead, *The Evil Flesh Trade in Young Children* (Sept. 30, 2002), https://www.rutherford.org/ publications_resources/john_whiteheads_commentary/the_evil_flesh_trade_in_young_children.

STATEMENT OF THE CASE

The Rutherford Institute adopts by reference the statement included in the Respondents' Brief.

SUMMARY OF THE ARGUMENT

This case involves a novel and intrusive requirement on certain private recipients of federal Leadership Act funding to adopt *as their own* a government-mandated policy position. Recipients must explicitly state that they are "opposed to the practices of prostitution and sex trafficking" and agree with the government that this opposition is "because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. § 89.1(b); *see also* 22 U.S.C. § 7631(f). The Policy Requirement in no way resembles the narrow restrictions on the use of federal funds to conduct activities that this Court has sanctioned previously. Indeed, such restrictions are already in the Leadership Act, and are not a part of this challenge. And the Policy Requirement is wholly unlike "government speech" initiatives that the government can selectively fund and control.

Because the Policy Requirement does not fit within existing authority, the government stretches to support an expansive view of its power. The government claims authority to require expressions of personal policy agreement, so long as the demand is attached to spending and is not overtly designed to *suppress* "disfavored" speech. This approach would insulate a wide swath of compulsions from First Amendment review, so long as they satisfy the relatively lax demands of the Spending Clause. Such a broad grant of power over the beliefs of

private citizens is antithetical to the fundamental purpose of the Free Speech Clause.

Compelled speech requirements—political, artistic, religious, scientific, or commercial—are *presumed* to be unconstitutional. The burden rests on the *government* to justify its impositions, and for good reason. If the government can readily require private parties to adopt its viewpoints with virtually no First Amendment review, its reach expands while accountability diminishes.

The government invokes the relatively new and narrow "government speech" doctrine to help it immunize the Policy Requirement from First Amendment scrutiny. But neither the Leadership Act nor the Policy Requirement qualifies as "government speech." Were "government speech" expanded to justify forced expressions of agreement related to the Leadership Act, there would be virtually no limit to the government's ability to demand that private entities adopt government views on a variety of subjects. Under the government's rationale, its ability to purchase fealty to its favored views would be nearly limitless as the reach of federal funding expands.

- Housing grants under a program to reduce homelessness could be conditioned on an expression of agreement with the wisdom of individuals finishing high school, getting a job, and waiting until marriage to have children because these behaviors have been shown to reduce the risk of poverty.[3]

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3. *See, e.g.*, NYC Human Resources Administration Department of Social Services, *Think Being a Teen Parent Won't Cost You? http://www.nyc.gov/html/hra/html/programs/teen_pregnancy_campaign.shtml* (last visited Mar. 31, 2013) (New York City public awareness campaign).

- A recipient of agricultural subsidies could be required to expressly agree with, and adopt a position advocating, a government statement that organic food is better for human health and the environment, because it "can provide an additional avenue for climate change mitigation through such measures as enhanced soil carbon sequestration."[4]

- Recipients of grant money under programs to reduce school violence could be required to adopt a policy supporting revisions to state mental health policies to make it easier for the dangerous mentally ill to be involuntarily committed, because such changes would increase the number of people federally disabled from firearm ownership under 18 U.S.C. § 922(g)(4).[5]

These requirements would be virtually exempt from First Amendment review under the government's approach. In an era of expanding entanglement between government, private citizens and organizations, Congress and the Executive must be held to the standards imposed by the First Amendment. Government should not be allowed to use the public fisc to purchase agreement in the marketplace of ideas.

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4. Elisa Morgera et al., U.N. Food & Agric. Org., *Organic Agriculture and the Law* v (2012), *available at* http://www.fao.org/organicag/oa-publications/pub-cat/sustainability-and-perspectives/en/.

5. *See generally,* Nat'l Conference of State Legislatures, *Possession of a Firearm by the Mentally Ill* (Jan. 2013), http://www.ncsl.org/issues-research/justice/possession-of-a-firearm-by-the-mentally-ill.aspx (describing federal firearms disability and state laws).

ARGUMENT

I. The First Amendment Protects Private Parties From Being Forced To Adopt Government Views.

A. Forced Speech Is Presumed Unconstitutional.

The First Amendment guarantees "both the right to speak freely and *the right to refrain from speaking at all*." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added). Any law that "requires the utterance of a particular message favored by the Government" thus "contravenes this essential right." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Such compulsions are subject to exacting scrutiny because the government may not "require[] affirmation of a belief and an attitude of mind," or demand that Americans "profess any statement of belief," even if doing so does not require the person to "forego any contrary convictions of their own." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–634 (1943). Our "system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714.

Governments often defend their requirements by arguing that First Amendment concerns are addressed by "attribution" to the government or "non-attribution" to the private speaker, which makes clear that any compelled speech does not represent the views of the speaker. Petitioners admit that Respondents are not required to publicly convey any purported government message. *See, e.g.* Pet. Br. 22, 27. But even if this case did involve

a public message, the Policy Requirement could not be defended on any "non-attribution" theory, because the Policy Requirement requires personal adoption by the organization.

This Court has made clear that forced speech is not cured by a disclaimer that the speech is not that of the conscripted party. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 n.11 (1985) ("*PG&E*") ("The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message.") (citations omitted).

This Court thus has rejected the argument that forced speech is permissible so long as it "does not compel an objecting party (here a corporate entity) itself to express views it disfavors; and the mandated scheme does not compel the expression of political or ideological views." *United States v. United Foods*, 533 U.S. 405, 411 (2001) (rejecting arguments in support of forced marketing assessment). Even where the government is engaged in *advertising* of its own, this Court has found it important that the program did not "require[] attribution" to a private party. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564 (2005) (noting possible challenge to forced subsidy if "individual beef advertisements were attributed to" objecting private party). Attribution thus is often a critical part of the analysis of compelled speech.

Remarkably, however, the Policy Requirement makes no attempt to hide behind the typical "non-attribution" defense. Indeed, it boldly requires precisely the evil that

this Court described in *Barnette*: that a private party is required to express "affirmation of a belief and an attitude of mind." *Barnette*, 319 U.S. at 633.[6] The Policy Requirement must be *adopted as the private parties' own*. This is what makes the requirement here so novel and dangerous.

B. The First Amendment Constrains The Spending Power.

"The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring). The First Amendment restrains the coercive power of government and ensures democratic accountability.

As the Supreme Court reaffirmed recently, the government "can express [its] view through its own speech," but "may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v.*

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6. The government tries to minimize the requirement by arguing that the affirmation need only be made to government agencies, not to the general public. Pet. Br. 43 n.6, 44. This does not fix the problem. The profession of agreement is a binding representation to the government designed to ensure the recipient adopts and adheres to a position that is the same as the government's. It smacks of loyalty oaths administered by bureaucrats. *Cf. Speiser v. Randall*, 357 U.S. 513 (1958) (striking down condition of tax exemption requiring that veterans declare on form filed with tax assessor that they did not advocate the forcible overthrow of government). A government that can demand expressions of belief to it can equally demand expressions of belief to others.

IMS Health, Inc., 131 S. Ct. 2553, 2671 (2011); *see also PG&E*, 475 U.S. at 13-14 (rejecting requirement that utility give third parties access to utility's newsletter). This is because "[w]hen the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001) (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

When the government forces private parties to adopt its subjective position *as the private parties' own*, it violates individual liberty. By interfering with privately held beliefs, the government also manipulates debate in a way that limits democratic accountability. To protect against this, the First Amendment requires the government to justify its impositions.

The First Amendment demands this even when the government acts under the Spending power. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), the Court rejected a First Amendment challenge to the Solomon Amendment's requirement that recipients of federal education money provide equal access to military recruiters. The Court made equally clear that the Spending Clause does not grant Congress free rein to interfere with First Amendment rights. *See id.* at 59. The Court acknowledged that the obligation would have been unconstitutional "if Congress could not directly require universities to provide military recruiters equal access to their students," placing great weight on Congress's separate power to raise armies. *Id.* The Court also found that the Solomon Amendment's impact on speech was "incidental" to a limitation on conduct. *Id.* at 62. Finally, the Court noted that the access obligation did not interfere "with [the]

speaker's desired message." *Id.* at 63. *FAIR* shows that reliance on the Spending Clause alone will not immunize from First Amendment review a speech regulation that compels private expression.

Here, far from being merely "incidental" to a limitation on conduct, the Policy Requirement's impact on speech is the whole point of the provision. Respondents are not required merely to "accommodate" government action or refrain from speech or activity that interferes with the program. Respondents must adopt the government's subjective policy position and reasoning as *their own*. This deserves searching First Amendment review.

II. The Government Speech Doctrine Does Not Save The Policy Requirement.

This Court has recognized only a few exceptions to the First Amendment's condemnation of forced speech. The Rutherford Institute focuses on the "government speech" aspect of the case.

The Solicitor General's brief seems to invoke the government speech doctrine to justify the Policy Requirement, but it is inapplicable.[7] The nascent "government speech" doctrine seeks to accommodate the government's prerogative to control its message when it speaks on its own. It is a recognition that "[t]he Government's own speech . . . is exempt from

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7. *Amicus* for Petitioners, American Center for Law and Justice, agree. *See* ACLJ Br. 11 ("Here, however, the anti-prostitution and anti-sex trafficking policy the government requires of grantees is not *government* speech, but rather a policy *the grantee itself* must have.") (emphasis in original).

First Amendment scrutiny." *Johanns*, 544 U.S. at 553. A government entity has the right to "speak for itself." *Southworth*, 529 U.S. at 229. And when it speaks, the government "is entitled to say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express. Where—unlike this case—government speech is involved, "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (citing *Johanns*, 544 U.S. at 562).

Thus, "where the government controls the message, 'it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources'" *id.* (citing and quoting *Rosenberger*, 515 at 833), and the "government entity may 'regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message,'" *id.* (citing and quoting *Rosenberger*, 515 U.S. at 833).

The doctrine has been characterized as a "defense" that "insulates the government's own expressive choices from free speech clause challenges by private speakers seeking to prevent or alter the delivery of the government's own message." Helen Norton, *Government Speech in Transition*, 57 S.D. L. Rev. 421, 421 (2012). The defense depends on the government using private speakers to disseminate *the government's own message* in ways not present here. In fact, "the government should lose when the character of the speech is at issue and its governmental nature has not been made clear." *Summum*, 555 U.S. at 485 (Souter, J., concurring).

A. The Leadership Act And Policy Requirement Are Not Government Speech

Perhaps because of its poor compatibility, the Solicitor General flirts with the government speech doctrine but does not fully embrace it. The government uses dicta from *Rosenberger* to assert that "when the government 'enlists private entities to convey its own message . . . the private speakers are not entitled to transmit the message in a way that distances themselves from it or even indicates their own lack of agreement with it." Pet. Br. 31 (citations omitted).[8] The government suggests that whenever it spends money in support of a policy, the government speech doctrine allows it to require recipients to hold *as their own* preferred messages consistent therewith.

The Court has "provided very little guidance as to what constitutes government speech," *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001), but

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8. Until *Johanns*, *Summum*, and *FAIR*, the "government speech" doctrine was little more than dicta from decisions ruling in favor of private speech rights. The doctrine finds its foundation in public forum cases analyzing speech *restrictions* and ruling *against* the government. *See Summum*, 555 U.S. at 468 (citing *Southworth*, 529 U.S. 217 (2002) (analogizing student activities fund to public forum and determining that viewpoint neutrality requirement was sufficient to protect objecting students' rights); *Rosenberger*, 515 U.S. 819 (1995) (analogizing student activities fund to a "metaphysical" forum and finding University may not silence student expression of certain viewpoints)). The government invokes language from *Velazquez*, Pet. Br. 22, but that also involved public forum analysis. The Court held that the government could not condition funding of legal services on a prohibition against lawyers making arguments to challenge federal law. *Velazquez*, 531 U.S. at 548-49. If anything, *Velazquez* shows the limits of funding conditions.

the Policy Requirement is wholly unlike situations where this Court has found "government speech." Recipients of public funding must adopt a policy explicitly opposing prostitution *on their own behalf* and are not required to express that message to any audience except the government. The regime is not a government messaging scheme or a compelled subsidy of government speech. Combatting prostitution is at best a subsidiary goal. The government speech doctrine is not in play.

1. The regime is not a messaging scheme

The Leadership Act is directed at halting the HIV/AIDS pandemic, principally through medical care and disease prevention via conduct, including procurement of HIV/AIDS pharmaceuticals, food and nutrition programs, and related initiatives. The government asserts that the Policy Requirement is immune from First Amendment scrutiny because the government may "enlist private parties to convey its own message." Pet. Br. 21 (citing *Rosenberger*, 515 U.S. at 833). But neither the Leadership Act nor the Policy Requirement is a messaging program that can be characterized as "government speech."

Johanns illustrates this. *Johanns* involved a government advertising campaign encouraging the consumption of beef. *See* 544 U.S. at 553-55. The campaign was funded by cattle producers through a targeted assessment. Congress "set out the overarching message of the advertisements" and the Secretary of Agriculture approved each advertisement. *Id.* at 561. The advertising campaign constituted "speech," and the government's control over it made "government speech." *Id.* at 560-62.

That concept of "government speech" cannot reach the Leadership Act or the Policy Requirement. The Policy Requirement compels funding recipients to express a viewpoint on their own behalf, to the government. It therefore cannot be classified as the *government's* speech. Further, even if the Policy Requirement required public speech, the doctrine would not apply. The advertising "message" in *Johanns* was the essence of the program; it was determined and controlled by the government, and only *subsidized* by private funds. In distinguishing a permissible "compelled *subsidy*" of "government speech" from impermissible forced speech, the Court made plain its narrow approach to "government speech." *Id.* at 563-65. The Leadership Act and Policy Requirement are not a "messaging campaign" and cannot be considered "government speech."

2. The Leadership Act is not an "anti-prostitution" program

Putting aside the fact that the Leadership Act cannot be characterized as a "messaging" scheme, the subject of the Policy Requirement is in any event clearly *subsidiary* to the Act's primary purpose of treating and preventing HIV/AIDS.[9]

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9. The Leadership Act's legislative history confirms that the "addition of the Policy Requirement was ancillary to Congress' goal to provide funding for HIV/AIDS efforts." Garima Malhotra, *Good Intentions, Bad Consequences: How Congress' Efforts to Eradicate HIV/AIDS Stifle the Speech of Humanitarian Organizations*, 61 Cath. U. L. Rev. 839, 860 (2012) (citing *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003: Markup Before the H. Comm. on Int'l Relations*, 108th Cong. 77, at 149 (statement of Rep. Smith, Vice Chairman, H. Comm. on Int'l Relations)).

If the Court sanctions re-casting a program's "message" based on the mere presence of an issue in statutory findings or limitations, the Leadership Act could as easily be re-cast as expressing a message of "support" for Ugandan President Museveni or denouncing international conflicts that displace persons as refugees. *See* 22 U.S.C. § 7601(20)(B) (extolling Museveni's leadership on HIV/AIDS issues); 22 U.S.C. § 7601(3)(C) (finding that women and children who are refugees or internally displaced are especially at risk for HIV infection due to their vulnerability to sexual exploitation). As the Second Circuit recognized, "if the government speech principle allowed Congress to compel funding on every subsidiary issue subsumed within a federal spending program, the exception would swallow the rule." *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 238 (2d Cir. 2011).

3. The scheme requires attribution to Respondents, taking it outside of "government speech"

Even if the Policy Requirement compelled recipients to express a message to the public opposing prostitution as their own—which, as discussed, it does not—the government speech doctrine would still not apply. Under this counterfactual, the Leadership Act and Policy Requirement do not follow the typical model of attempting to separate a government message from that of the private speaker. In fact, the Policy Requirement would do precisely the opposite. By requiring personal adoption, it *requires attribution* of belief to private parties, forcing them to parrot the government's opinion in their own words, with no indication that their position was bought and paid for with government money. Attribution to the

government, rather than private parties, is at the core of the "government speech" doctrine. Viewed through this lens, the *raison d'etre* of the Policy Requirement would be attribution to private parties, because it requires the recipient to explicitly adopt the policy *as its own*. This is fatal even if the regime could be seen as constituting or supporting a messaging campaign.

This unique and novel requirement of private attribution on the part of recipients takes the Policy Requirement far outside those cases that allow the government to control *its own message*. In *Johanns*, this Court held that it was important that there was no indication that the government message would be attributed to private parties. *Id.* at 565. The challengers argued that "[c]ommunications cannot be 'government speech,' . . . if they are attributed to someone other than the government," *id.* at 564. The Court did not answer that argument because there was no risk of attribution, but noted "there might be a valid objection if those singled out to pay the tax are closely linked with the expression in a way that makes them appear to endorse the government message." *Id.* at 565 n.8 (quotes and citations omitted).[10] The Policy Requirement does not just "closely link[]"expression with the private speaker. It requires Respondents to adopt a particular view *as their own*.

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10. Justice Thomas noted in concurrence, "[t]he government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control." *Johanns*, 544 U.S at 568 (Thomas, J., concurring).

Likewise, in *Summum*, this Court held that the public monument was government speech because viewers would understand that *the government was the speaker*. *See Summum*, 555 U.S. at 470. Conversely, by requiring Respondents to adopt the government's view *as their own*, the Policy Requirement is designed to obscure the fact that the government has purchased the private party's speech.

The concept of attribution has been important since *Rust*,[11] which upheld a prohibition on the use of federal funds to support abortion-related speech and activities because it did not "require a doctor to represent as his own any opinion that he does not in fact hold," *Rust*, 500 U.S. at 200. Here, Respondents are required to adopt the government's opinion *as their own*.

Requiring attribution of "government speech" to the government facilitates democratic accountability. As Justice Kennedy observed, "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Southworth*, 529 U.S. at 235. When speech is not clearly the government's the public cannot hold the government accountable. For all these reasons, the government speech doctrine simply does not apply.

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11. *Rust* is dealt with at length in Respondents' brief. *See* Resp't Br. 29-30, 37-38, 42, 46-49. Suffice it to say, the Rutherford Institute sees no resemblance between the Policy Requirement and the program at issue in *Rust*.

B. The Policy Requirement Cannot Be Used As A Prophylactic Measure To Protect A Government Program

Under the government's theory, the Policy Requirement is simply a "legitimate and appropriate step" to ensure "that its message is neither garbled nor distorted by the grantee." Pet. Br. 21-22 (citing *Rosenberger*, 515 U.S. at 833). Even if the Leadership Act embodies a government "message" about prostitution (a stretch, as explained) the Policy Requirement is an unnecessary prophylactic, which must be subject to First Amendment scrutiny and rejected.

The Leadership Act already commands that none of its funds "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). While this restriction lies within the guideposts recognized in *Rust*, the Policy Requirement intentionally pushes much farther.

In the government's view, if private actors receiving Leadership Act grants do not express fealty to the government's view, it might be hard to police activity that *could* have an incidental effect on the government's claimed "message." The government explains, "[t]hat is especially true in light of the acute difficulties of monitoring the way in which private organizations provide HIV/AIDS programs and services throughout the world. The Policy Requirement helps to guarantee that the organizations receiving Leadership Act funds act consistently with Congress's goals in their overseas operations." Pet. Cert. 15-16. In other words, expedience justifies the Policy Requirement.

"[P]rophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Where more tailored options "are available," to serve identified interests, "prophylactic" speech compulsion is disfavored. *Riley v. Nat'l Fed'n for the Blind*, 487 U.S. 781, 800-01 (1988). More narrowly tailored options like vigorous enforcement of restrictions are "in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." *Id.* at 800.

The government would relieve itself of the burden to show that Respondents' failure to *expressly adopt* the government's position actually threatens or has "distorted" any government message, anti-prostitution or otherwise. It is far from obvious that silence, particularly when coupled with the restrictions in Section 7631(e), carries any risk of message distortion, much less one sufficient to justify a forced expression of subjective agreement. Congress did not put forth evidence that such policy adoption was necessary, and as Respondents point out, the Policy Requirement has been enjoined for six years and the government provides no evidence that Respondents' private activities have diluted the government's purported message—anti-prostitution or otherwise. Cert. Reply 14.

If the government can avoid the First Amendment simply by claiming that the Policy Requirement is a "legitimate and appropriate" way to efficiently preserve the Leadership Act's "message" or goals, its power would be limitless. There is no "government speech" that needs protecting, but even if there were, the novel Policy Requirement is an inappropriate prophylactic.

III. The First Amendment's Restraints On Government Are Needed Now More Than Ever.

With increased federal spending and growing entanglement of public and private entities, the government's theory will leave entities doing business with the government virtually no recourse against compelled speech.

A. Government Is Expanding Its Reach Through Thousands Of Diverse Grants And Programs.

The federal government runs thousands of grant programs, with discretion over administration and eligibility scattered throughout twenty-six grant-making agencies.[12] "The federal government's use of grants to achieve national objectives and respond to emerging trends . . . has grown significantly in the last two decades." U.S. Gov't Accountability Office, GAO-11-773T, *Federal Grants: Improvements Needed in Oversight and Accountability Processes* 3 (2011).

Grants reach a variety of sectors, funding "training, research, planning, construction, and the provision of services such as health care, education, transportation, and homeland security." U.S. Gov't Accountability Office, GAO-11-478, *Grants.gov: Additional Action Needed to Address Persistent Governance and Funding Challenges* 1 (2011). The 2012 Catalog of Federal Domestic Assistance provides

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12. *See* Grants.gov, http://www.grants.gov/applicants / recovery.jsp (last viewed Apr. 1, 2013). The federal government's grant management portal demonstrates the array of grants to which strings could be attached.

information on over 2200 domestic grant programs.[13] From Pell grants to "Postconviction DNA Testing," "Renewable Energy Research and Development," and "Infant Adoption Awareness Training," the government is allocating increasing resources to universities, non-profits, local governments, small businesses and individuals that are more and more dependent on that funding.[14]

Public-private partnerships similarly leverage federal and private resources to accomplish a wide range of objectives. *See* U.S. Dep't of Health & Human Servs., *The Leveraging Handbook: An Agency Resource for*

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13. *See* Catalog of Federal Domestic Assistance, https://www.cfda.gov/ (last viewed Mar. 31, 2013).

14. The Urban Institute's Center on Nonprofits and Philanthropy released a national survey that estimated "government agencies have approximately 200,000 formal agreements (contracts and grants) with about 33,000 human service nonprofit organizations," and that "60 percent of organizations with government grants and contracts count those grants and contracts as their largest funding source." Elizabeth T. Boris et al., *Human Service Nonprofits and Government Collaboration: Findings from the 2010 National Survey of Nonprofit Government Contracting and Grants* (2010), *available at* http://www.urban.org/publications/412228.html. Universities and local governments also depend on federal funding. *See, e.g.*, Goldie Blumenstyk, *For-Profit Colleges Show Increasing Dependence on Federal Student Aid*, The Chronicle of Higher Education (Feb. 15, 2011) *available at* http://chronicle.com/article/For-Profit-Colleges-Show/126394/; David B. Muhlhausen, *Fire Grants: Do Not Reauthorize an Ineffective Program* 1 (Heritage Foundation 2012), *available at* http://www.heritage.org/research/reports/2012/11/fire-grants-do-not-reauthorize-femas-ineffective-program (explaining that grants create fire department dependence on federal funding).

Effective Collaborations 4 (2003).[15] While partnerships are critical to public policy, they involve the commingling of government and private resources.[16] This gives government an incentive to force private parties seeking needed grant money to adopt, endorse, and convey desired messages, instead of directing and funding its own speech.

B. Without The First Amendment As A Check, The Government Can Purchase Private Beliefs And Influence The Marketplace Of Ideas.

In the absence of robust First Amendment review, the government will be empowered to demand that private parties expressly agree with the government's views on almost any topic. The government would be foolish to pass on such cost-effective means of shoring up support for its messages.[17] It is not difficult to see where this leads.

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15. The Biomarkers Consortium, for instance includes the National Institutes of Health (NIH), the U.S. Food and Drug Administration (FDA) and private entities like as Pfizer, Abbott Laboratories, and Johnson & Johnson, to promote discovery of biological markers that aid disease prevention and treatment. *See* FDA, Public-Private Partnership Program, Biomarker Consortium, http://www.fda.gov/AboutFDA/PartnershipsCollaborations/PublicPrivatePartnershipProgram/ucm231115.htm.

16. *See generally* FDA, *Guidance for FDA Staff: The Leveraging Handbook* 5 (2003), *available at* http://www.fda.gov/ downloads/AboutFDA/CentersOffices/CDER/WhatWeDo/UCM121662.pdf ("FDA's operating environment is becoming more and more interconnected with other stakeholders.").

17. Not surprisingly, governments already are looking to expand the government speech doctrine to insulate regulation from review. For example, the City of New York invoked the

- Hospitals receiving research grants to prevent cancer could be required to agree with a government position opposing marijuana legalization, because marijuana "may promote cancer of the respiratory tract and disrupt the immune system."[18]

- Schools receiving government funding under a program to eradicate achievement gaps could be required to affirm support for school choice and vouchers[19] (or conversely support for union rights, depending on the government's view of how such policies improve educational opportunity).

- Recipients of cybersecurity research and development grants[20] could be required to expressly

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doctrine to insulate forced retail tobacco warnings from First Amendment review. *See* Brief of Defendants at 37, *23-34 94th St. Grocery Corp. v. New York City Bd. of Health*, 685 F.3d 174 (2d Cir. 2012) (No. 11-0091) (arguing warnings in retail stores constitute "government speech" because "[t]here is no question that the signage is the government's own speech, and, consequently, private individuals are not required to personally express any message").

18. Office of National Drug Control Policy, *What Americans Need to Know about Marijuana* 2 (2011), *available at* www.ncjrs.gov/ondcppubs/publications/pdf/mj_rev.pdf

19. *See, e.g.*, Caroline Hoxby, *School Choice and School Productivity (Or, Could School Choice be a Tide That Lifts All Boats?)*, National Bureau of Economic Research Working Paper No. 8873 (April 2002), *available at* http://www.nber.org/papers/w8873.

20. *See, e.g.*, Cybersecurity Act of 2012, S. 3414, 112th Cong. (2012) §§ 301-04 (establishing federal research and development funding on cyber security).

> agree that because China is a major source of attacks seeking to harm the United States, no economic cooperation should be pursued until China ceases and publicly renounces cyber-espionage.[21]

Under the government's approach, these and countless other demands could be imposed with virtually no First Amendment protection. A quick review of the thousands of grants available to individuals, non-profits, and others, *see supra* notes 12, 13, reveals the potential breadth of the government's position.

By contrast, the government's "Just Say No" and apartheid hypotheticals are unpersuasive. Pet. Br. 32-33. Indeed, they demonstrate how novel the Policy Requirement is. Instead of offering examples of existing demands like the Policy Requirement that might plausibly be jeopardized if Respondents prevail, the government conjures up hypotheticals based on earlier, more modest programs.[22]

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21. *See, e.g.*, Mandiant, *APT1: Exposing One of China's Cyber Espionage Units* (2013), *available at* http://intelreport.mandiant.com/ (attributing cyber-espionage to China).

22. The "Just Say No" public messaging campaign was initiated by First Lady Nancy Reagan and does not appear to have required grantees to express fealty to government views. *See, e.g.*, 42 U.S.C. § 290aa-12 (repealed 1992) (permitting the Secretary of Health and Human Services to grant money to private entities providing treatment, making no reference to express adoption of a government position). Similarly, Congress took action in the 1980s to combat apartheid through what looks like regulation of conduct, not thought. *See* Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (repealed 1993) (requiring U.S. corporations that employed more than 25 people in South Africa to comply with

The government equates the Policy Requirement to a hypothetical in which the government funds a campaign urging kids to "Just Say No" to drugs and requires grantees to state they oppose drug use by children. First of all, that program's public message and the required private policy are coterminous. The example looks more like *Johanns* than the Policy Requirement, because the "Just Say No" program is a *messaging campaign* that (depending on its structure) is likely to be "government speech" while the Leadership Act is not an "anti-prostitution and sex-trafficking" campaign. A more apt analogy would amend the hypothetical to require a "Just Say No" grant recipient to adopt a policy position *subsidiary* to the anti-drug use objective, such as opposing the depiction of drug use in movies, television, and video games because the government believes there is an association between such depictions and teenage substance abuse.[23]

The apartheid hypothetical also fails. It describes the program as one "to address racial violence" and claims the right to limit funding to organizations that adopt a policy "opposing apartheid," because Congress "belie[ved]" that apartheid was a cause of racial violence. Pet. Br. 32. The

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a Code of Conduct prohibiting racial discrimination); *see generally* Jeff Walker, Economic Sanctions: United States Sanctions Against South Africa – Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986), 28 Harv. Int'l L.J. 117, 120 (1986) (explaining that the Comprehensive Anti-Apartheid Act prohibited new investments and loans to South Africa).

23. *See, e.g.*, Johns Hopkins Children's Center, *2011: Media and Adolescent Substance Abuse* (Mar. 16, 2011), http://www.hopkinschildrens.org/media-and-adolescent-substance-abuse.aspx.

hypothetical's generality provides no basis for evaluating the message compelled, its relationship to the "anti-racial violence" program or government determinations about how opposing apartheid advances those goals. In the government's view, these questions are irrelevant because there need be no meaningful First Amendment inquiry *at all.*

If the government can require a private party to adopt an "anti-apartheid" position pursuant to a general anti-racial violence campaign without First Amendment review, there is no reason it could not require "anti-racial violence" grantees to adopt other subsidiary positions. Under this logic, grantees could be required to express support for particular democratic norms, such as majority-minority electoral districts, if the government believes that greater diversity among government officials reduces racial tension. Or they could be required to support hate speech restrictions and hate crime laws, on the theory that they help reduce racial violence.

The Court should not bless the government's Orwellian attempt to control private beliefs. Applying the First Amendment to demands like the Policy Requirement will not disable the government from speaking or from imposing appropriate restrictions that can survive First Amendment review. This Court must not expand the government speech doctrine, because doing so will allow the Spending Clause to swallow the First Amendment.

CONCLUSION

The Court should apply the First Amendment to invalidate the Policy Requirement.

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AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,
Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY
INTERNATIONAL, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* SECRETARIAT OF THE JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS (UNAIDS SECRETARIAT) IN SUPPORT OF RESPONDENTS

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22 U.S.C. § 7603 6

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OTHER AUTHORITIES

Address of the U.N. Secretary-General to the International AIDS Conference in Mexico City, U.N. Doc. SG/SM/11727 (Aug. 4, 2008) 11

Stefan Baral *et al.*, *Burden of HIV Among Female Sex Workers in Low-income and Middle-income Countries: a Systematic Review and Meta-analysis*, 12 Lancet Infectious Diseases 538 (2012).....9

Deanna Kerrigan *et al.*, *Community Development and HIV/STI-related Vulnerability Among Female Sex Workers in Rio de Janeiro, Brazil*, 23 Health Educ. Research 137 (2007).....13

Deanna Kerrigan *et al.*, *The Global HIV Epidemics Among Sex Workers,* The World Bank (2013), *available at* http://www.worldbank.org/content/dam/Worldbank/document/GlobalHIVEpidemicsAmongSexWorkers.pdf 9, 13, 14, 18

TABLE OF AUTHORITIES
(continued)

Page(s)

Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS, U.N. Doc. A/RES/65/277 (June 10, 2011) 2

Political Declaration on HIV/AIDS, U.N. Doc. A/RES/60/262 (June 2, 2006) 12

Rosalía Rodriguez-García, René Bonnel, David Wilson, and N'Della N'Jie, *Investing in Communities Achieves Results: Findings from an Evaluation of Community Responses to HIV and AIDS*, Directions in Development Series, The World Bank (2013), *available at* http://aidsconsortium.org.uk/wp-content/uploads/2013/01/9780821397411.pdf. 15

Michael L. Rekart, *Sex-work Harm Reduction*, 366 The Lancet 2123 (2005) 12

Bernhard Schwartländer *et al.*, *Towards an Improved Investment Approach for an Effective Response to HIV/AIDS*, 377 The Lancet 2031 (2011) 17

Statement of Dr. Peter Piot, UNAIDS Executive Director on Signing of "Tom Lantos and Henry J. Hyde Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008," http://data.unaids.org/pub/PressStatement/2008/20080730_statement_pepfar_en.pdf (July 30, 2008) 5

TABLE OF AUTHORITIES
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Page(s)

UNAIDS, *Global Report: Report on the Global AIDS Epidemic* (2012), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_en.pdf. 9

UNAIDS, *Intensifying HIV Prevention: UNAIDS Policy Position Paper* (2005), *available at* http://data.unaids.org/publications/irc-pub06/jc1165-intensif_hiv-newstyle_en.pdf 12

UNAIDS, *Investing for Results. Results for People. A People-Centred Investment Tool Towards Ending AIDS*, UNAIDS/PCB(30)12.CRP.4 (2012) 17

UNAIDS, *UNAIDS Guidance Note on HIV and Sex Work* (2012), http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf ..... *passim*

UNFPA, UNAIDS, and Asia-Pacific Network of Sex Workers, *The HIV and Sex Work Collection: Innovative Responses in Asia and the Pacific*, *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2012/20121212_HIV_SW.pdf 18

TABLE OF AUTHORITIES
(continued)

Page(s)

WHO, UNFPA, UNAIDS and NSWP, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low-and Middle-income Countries: Recommendations for a Public Health Approach* (2012) *available at* http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf 7, 8, 9, 17

INTEREST OF *AMICUS CURIAE*[1]

The Joint United Nations Programme on HIV/AIDS ("UNAIDS") leads and inspires the world to achieve its shared vision of zero new HIV infections, zero discrimination and zero AIDS-related deaths. UNAIDS unites the efforts of the UNAIDS Secretariat and eleven United Nations ("UN") organizations ("UNAIDS Cosponsors"),[2] and works closely with global and national partners to maximize results for the AIDS response.

UNAIDS is governed by the UNAIDS Programme Coordinating Board comprised of representatives of twenty-two governments from all geographic regions, the UNAIDS Cosponsors, and five representatives of nongovernmental organizations, including networks of people living with HIV.

UNAIDS supports the implementation of the declarations on HIV and AIDS adopted by the three

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for petitioners and respondents consented to the filing of this *amicus* brief by letters dated April 1 and March 29, 2013, respectively.

[2] The eleven UNAIDS Cosponsors are: the Office of the United Nations High Commissioner for Refugees ("UNHCR"); the United Nations Children's Fund ("UNICEF"); the World Food Programme ("WFP"); the United Nations Development Programme ("UNDP"); the United Nations Population Fund ("UNFPA"); the United Nations Office on Drugs and Crime ("UNODC"); the United Nations Entity for Gender Equality and the Empowerment of Women ("UN Women"); the International Labor Organization ("ILO"); the United Nations Educational, Scientific and Cultural Organization ("UNESCO"); the World Health Organization ("WHO"); and the World Bank. The present brief is filed solely on behalf of the UNAIDS Secretariat.

sessions of the UN General Assembly dedicated to the global AIDS epidemic.[3] In these declarations, UN Member States have made several commitments regarding different aspects of the response to HIV. Among these is a General Assembly resolution titled the *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, U.N. Doc. A/RES/65/277 (June 10, 2011), in which UN Member States noted that many national HIV-prevention strategies inadequately focus on populations that epidemiological evidence shows to be at higher risk and that these populations include sex workers.

The UNAIDS Secretariat is a global expert on the HIV epidemic and the response to it. The UNAIDS Secretariat benefits from the expertise and resources of its Cosponsors.[4] The UNAIDS Secretariat is comprised of approximately 850 staff. The majority of staff works in Country Offices, providing advice and support to national counterparts on policies and programs towards effective and rights-based responses to national HIV epidemics. Regional Support Teams and Liaison Offices work with regional partners to coordinate and provide programming and technical support to strengthen national responses.

As *Amicus Curiae*, the UNAIDS Secretariat is interested in supporting national governments and

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[3] The declarations on HIV and AIDS adopted by the three sessions of the UN General Assembly dedicated to the global AIDS epidemic are described in more detail in the Appendix to this brief.

[4] The objectives, structure and approach of UNAIDS are described in more detail in the Appendix to this brief.

civil society organizations in their efforts to adopt and implement the most effective responses to HIV, informed by public health evidence and human rights, including in terms of prevention, treatment, care and support among key populations at higher risk of HIV infection.

INTRODUCTION

This Court is considering a constitutional challenge brought by a number of nongovernmental organizations engaged in the international response to HIV to a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. §§ 7601 *et seq.* The provision at issue — section 7631(f) — mandates that, with some exceptions, no funds made available under the Leadership Act "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. § 7631(f). Respondents in this case, who receive funds under the Leadership Act, have represented that their work in addressing HIV includes engaging in various outreach efforts and partnership activities with marginalized "high-risk" groups, such as sex workers. Br. in Opp. 6; *see also* Br. for Resp'ts 11-12.[5]

The United States leadership in the global AIDS response has been instrumental in achieving important results in the response to HIV, and realizing access to HIV prevention, treatment, care and support for people living with, and affected by, HIV. The reduction in the rate of new HIV infection and the considerable increase in access to HIV

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[5] The UNAIDS Secretariat does not address the United States government's decision that the funding it allocates to the global response to HIV be spent in a particular way, as directed by the United States Congress. Rather, the UNAIDS Secretariat understands that the question involved in this case is what the nongovernmental organizations engaged in the global effort to address HIV may do with the privately donated funds, in light of the requirements of section 7631(f) of the Leadership Act.

treatment worldwide over the last ten years would not have been possible without the financial and political commitment of the United States, among others. The generosity of the United States government has helped to transform the global response to AIDS and the course of the epidemic. The President's Emergency Plan For AIDS Relief ("PEPFAR"), inaugurated by the Leadership Act, was the largest health initiative ever initiated by one country to address a global health epidemic. The important funding authorized by the Leadership Act made anti-retroviral medication widely available in the developing world, saving millions of lives. When the Leadership Act was re-authorized, and PEPFAR expanded, in 2008, UNAIDS praised it as "a historic event," and commended the leadership of the President and Congress of the United States in the global response to HIV. Statement from Dr. Peter Piot, UNAIDS Executive Director, on Signing of the "Tom Lantos and Henry J. Hyde Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008," http://data.unaids.org/pub/PressStatement/2008/20080730_statement_pepfar_en.pdf (July 30, 2008).

The UNAIDS Secretariat wishes to provide the Court with the benefit of its experience in supporting countries to formulate the most effective strategies for addressing the HIV epidemic, including the efforts to reduce the risk of HIV infection among particular vulnerable populations at higher risk of HIV infection, such as sex workers. Specifically, UNAIDS has developed a coordinated human rights-based approach to promoting universal access to HIV prevention, treatment, care and support in the context of sex work. *See* UNAIDS, *UNAIDS*

Guidance Note on HIV and Sex Work (2012), http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2009/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf (hereinafter "UNAIDS Guidance Note"). The fundamental goal of the Leadership Act is "to strengthen and enhance ... the effectiveness of the United States response to HIV/AIDS." 22 U.S.C. § 7603. In UNAIDS's view, "enhancing access for all, including those engaged in sex work, to HIV prevention, treatment, care and support" is "[f]undamental to reducing HIV risk and vulnerability." UNAIDS Guidance Note at 24.

UNAIDS has long recognized that the social and legal environments have a profound impact on the effectiveness of national HIV responses. UNAIDS encourages countries to develop and implement effective strategies for reducing HIV risk and vulnerability among sex workers — a population that is particularly vulnerable to HIV infection. According to UNAIDS, an essential feature of effective responses to HIV among sex workers is to work in partnership with sex workers to identify their needs and to advocate for policies and programs that improve their health, safety, and engagement in the HIV response. The UNAIDS Secretariat believes that comprehensive rights-based programs on HIV and sex work are critical to the success of the global HIV response.

SUMMARY OF ARGUMENT

Sex workers[6] represent a population that is highly at risk to HIV infection. The formulation of an optimal strategy for reducing HIV risk and vulnerability among sex workers is therefore a critical component of efforts to respond effectively to the global HIV epidemic. To support countries to effectively address HIV among sex workers, UNAIDS has called for an evidence-informed and human rights-based approach aimed at promoting universal access to HIV prevention, treatment, care and support in the context of sex work. A key feature of this approach is a focus on building supportive environments that enable access to services with dignity and respect. HIV prevention, treatment, care and support programs work best when they involve, and do not stigmatize, the affected populations in shaping and managing these programs.

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[6] "Sex workers include 'female, male and transgender adults and young people (18 years of age and above) who receive money or goods in exchange for sexual services, either regularly or occasionally.' It is important to note that sex work is consensual sex between adults." WHO, UNFPA, UNAIDS and NSWP, *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-income Countries: Recommendations for a Public Health Approach* 12 (2012) (citations omitted), *available at* http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf (hereinafter, "*Prevention and Treatment*"). Further, UNAIDS, in its *Guidance Note on HIV and Sex Work*, affirms "each individual's right not to be trafficked or held in slave-like conditions. It also affirms that all forms of the involvement of children (defined as people under the age of 18) in sex work and other forms of sexual exploitation or abuse contravenes United Nations conventions and international human rights law." UNAIDS Guidance Note at 3.

To be truly effective, organizations working with sex workers must have sufficient flexibility, funding and support to be able to involve sex workers in the formulation and implementation of the programs designed to address HIV within their communities. Programs aimed at addressing the specific needs of sex workers in terms of HIV prevention, treatment, care and support are generally underfunded and insufficient. The provision of adequate funding for HIV prevention, treatment, care and support programs focused on sex workers is an important part of effective responses to HIV. Limiting the ability of organizations to allocate funds to HIV-related programs that enable the engagement and participation of sex workers would further diminish the already scarce resources available to address HIV among sex workers, thus hindering efforts to end the HIV epidemic.

ARGUMENT

A. *Engagement with Sex Workers Is Essential to an Effective Response to HIV.*

Since the beginning of the AIDS epidemic, sex workers have been one of the groups at higher risk of and most vulnerable to HIV.[7] Data reports from

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[7] Studies have found, for example, that 62% of female sex workers in Nairobi, Kenya were infected with HIV in 1985. *Prevention and Treatment* at 10 (internal citation omitted). In 1988, 35% of the "femme libres" in Kinshasa, Democratic Republic of the Congo were HIV-positive. *Id.* (internal citation omitted). For female sex workers in Butare, Rwanda and Abidjan, Côte d'Ivoire, the prevalence rates were as high as 88%

2007-2011 indicate that an average of 11.8% of all female sex workers in low- and middle-income countries are HIV-positive. Stefan Baral *et al.*, "Burden of HIV Among Female Sex Workers in Low-income and Middle-income Countries: a Systematic Review and Meta-analysis," 12 *Lancet Infectious Diseases* 538 (2012). Female sex workers are 13.5 times more likely to be living with HIV than other women of reproductive age in low-income and middle-income countries. *Id.* at 542-43. In some regions, the rate of HIV infection among sex workers is considerably higher. In Sub-Saharan Africa, the region with the highest HIV prevalence, the pooled HIV prevalence among sex workers is 36.9%. *Id.* at 542; *Prevention and Treatment* at 10 (internal citation omitted).[8] Because the overwhelming majority of HIV infections are sexually transmitted, sex workers (as well as their clients) are at a heightened risk of HIV infection, in large measure as a result of a larger number of sex partners. UNAIDS Guidance Note at 2. Preventing HIV infection among this population is necessary and cost-effective. A recent study "demonstrate[s] the cost-effectiveness of scaling up HIV prevention and treatment among sex workers." Deanna Kerrigan *et al.*, *The Global HIV Epidemics Among Sex Workers* at xxix, The World Bank (2013), *available at* http://www.worldbank.org/

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and 89%, respectively, during the late 1980s and early 1990s. *Id.* (internal citation omitted).

[8] The rate of HIV infection among sex workers in some countries of Sub-Saharan Africa can be almost twice as high. In Swaziland, for instance, 70% of sex workers are HIV-positive. UNAIDS, *Global Report: Report on the Global AIDS Epidemic* 23 (2012), *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_en.pdf.

content/dam/Worldbank/document/GlobalHIVEpidemicsAmongSexWorkers.pdf (hereinafter, "*Global HIV Epidemics*, The World Bank").

The settings in which sex work occurs may profoundly increase HIV risk and vulnerability. UNAIDS Guidance Note at 4. "In many countries, laws, policies, discriminatory practices, and stigmatizing social attitudes drive sex work underground, impeding efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programmes. Sex workers frequently have insufficient access to adequate health services; male and female condoms and water-based lubricants; post-exposure prophylaxis following unprotected sex and rape; [and] management of sexually transmitted infections." *Id.* at 5. Conversely, HIV prevention efforts are more successful when sex workers can "assert control over their working environments and insist on safer sex." *Id.* at 4. An enabling environment permits sex workers to "practice or promote safer sex and other HIV risk reduction strategies." UNAIDS Guidance Note, Annex at 17. To be effective, policies and programs addressing HIV must also address factors that contribute to the demand for unprotected paid sex. UNAIDS Guidance Note, Annex at 2.

Effective approaches to HIV prevention in the context of sex work are those that recognize the realities of sex work and enable sex workers to protect themselves from the risk of HIV transmission. One of the key aspects of this is to enable sex workers to protect themselves every time they have sex with a client or their partners. UNAIDS Guidance Note, Annex at 8. The use of condoms and lubricants by

clients in all paid sex encounters will significantly reduce HIV risk and vulnerability for sex workers, clients and their other sexual partners, including spouses.

In short, engagement with sex worker populations is vitally important to minimizing the spread of HIV. "Sound, evidence-informed measures to address sex work constitute an integral component of an effective, comprehensive response to HIV." UNAIDS Guidance Note at 3. In recognition of the heightened risks faced by sex workers and, in turn, their clients, UNAIDS calls on countries to develop and implement evidence-informed and rights-based approaches to addressing HIV risk and vulnerability. *Id.* at 2, 3. This strategy of reducing HIV risk in the context of sex work is an important integral component of the global HIV response. Reducing vulnerability to HIV infection among this key population at higher risk will also reduce the risk of infection for sex workers' clients, as well as the spouses or partners of those clients.[9] "[I]n countries with legal protection and the protection of human rights for [sex workers,] many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment, and fewer deaths." Address of the U.N. Secretary-General to the International AIDS Conference in Mexico City, U.N. Doc. SG/SM/11727 (Aug. 4, 2008).

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[9] "The clients of sex workers reflect a cross-section of the population, representing all ages, economic classes, and ethnic backgrounds. In some cases, sex work clients include women. In many countries, men who buy sex represent the most important source of new HIV infections, risking HIV transmission to their wives and partners." UNAIDS Guidance Note at 14.

UNAIDS recommends that countries adopt a three-pronged approach to effectively address the complex issues raised by HIV in the context of sex work. UNAIDS Guidance Note at 7. The first pillar of this approach calls for universal access to comprehensive HIV prevention, treatment, care and support. The goal of ensuring universal access was formally adopted by the U.N. General Assembly in its 2006 Political Declaration on HIV/AIDS. *See Political Declaration on HIV/AIDS*, U.N. Doc. A/RES/60/262 (June 2, 2006). In order to meet this goal, UNAIDS recommends that "comprehensive, evidence-informed programmes for sex workers and their clients ... urgently be scaled up." UNAIDS Guidance Note at 8. The impact of these programs, however, depends to a significant extent on the participation of the affected group. *Id.* at 9 (citing UNAIDS, *Intensifying HIV Prevention: UNAIDS Policy Position Paper* (2005), *available at* http://data.unaids.org/publications/irc-pub06/jc1165-intensif_hiv-newstyle_en.pdf). The active and meaningful participation of sex workers in HIV prevention programs is an important determinant of the effectiveness of these programs. UNAIDS Guidance Note at 8 (citing Michael L. Rekart, *Sex-work Harm Reduction*, 366 The Lancet 2123, 2123-34 (2005)).

Efforts to respond to, and to eventually end, the HIV epidemic must also address structural barriers such as "policies, legislation, and customary practices that prevent access and utilization of appropriate HIV prevention, treatment, care and support." UNAIDS Guidance Note at 8. Sex workers currently encounter substantial obstacles to accessing HIV services, even where those services are theoretically

available. *Id.* at 10. To ensure meaningful access to these essential services, high-quality educational programs should be provided. By tailoring HIV services to the specific circumstances of sex workers, health care providers can significantly reduce HIV infection and improve the quality of life for those living with HIV. *Id.* at 12.

Of special relevance to this case is the second pillar of UNAIDS's recommended approach, which focuses on building supportive environments, strengthening partnerships, and expanding choices for sex workers through economic empowerment. *Id.* at 14. Community empowerment and the meaningful participation of sex workers in the HIV response are central to reducing HIV risk and vulnerability. *Id.* at 15 (internal citation omitted). To effectually prevent and treat HIV, sex workers should be involved in shaping the programs that affect their lives. *Id.* Without meaningful participation of sex workers, programs aimed at addressing HIV will not have the same chances of success. Where organizations led by sex workers have partnered with government actors, the response to HIV among sex workers has been particularly effective and sustainable. Support for such organizations is critical to a sustained and effective response to HIV and the promotion of sex worker's human rights and health. *Global HIV Epidemics,* The World Bank at xxxii. Several studies demonstrate that strong partnerships at national, regional, and local levels are crucial to formulating successful programs of combatting HIV among sex workers. *Id.*; *see also* Deanna Kerrigan *et al.*, *Community Development and HIV/STI-related Vulnerability Among Female Sex Workers in Rio de Janeiro, Brazil*, 23 Health Educ. Research 137, 144

(2007) (discussing the importance of community-building work with sex workers in fostering HIV-preventing behavior among that population).

Studies conducted on the benefits of "community empowerment-based approaches"[10] in four epidemiologically diverse countries, namely Brazil, Kenya, Thailand, and Ukraine, have shown that expanding a community empowerment-based approach to comprehensive HIV prevention intervention among sex workers has a demonstrable impact on the rate of HIV infection among both female sex workers and the overall adult population. Cumulatively, this approach averted up to 10,800 infections among sex workers and up to 20,700 infections among adults within five years. The impact is greatest in countries such as Kenya, where HIV prevalence is high among adults in the general population and female sex workers. Specifically, the rate of HIV infection among sex workers is reduced if they have equal access to HIV testing and treatment, which community-based outreach and social mobilization strategies can facilitate. *Global HIV Epidemics*, The World Bank at xxvii-xxviii.

An evaluation of community-led responses to HIV concluded that "there is strong associative evidence that empowerment of groups at high risk of

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[10] "Community empowerment-based approaches to comprehensive HIV prevention among sex workers rely on sex worker leadership to address social and structural barriers to HIV prevention, health and human rights. Key components of community empowerment-based approaches include the promotion of social cohesion and collective action among sex workers and efforts to facilitate their social inclusion and political participation." *Global HIV Epidemics*, The World Bank at xxvi.

infections, such as female sex workers ... can lead to behavioral changes" translating in "higher consistent condom use with occasional and regular clients." Rosalía Rodriguez-García, René Bonnel, David Wilson, and N'Della N'Jie, *Investing in Communities Achieves Results: Findings from an Evaluation of Community Responses to HIV and AIDS*, at 51, Directions in Development Series, The World Bank (2013), *available at* http://aidsconsortium.org.uk/wp-content/uploads/2013/01/9780821397411.pdf.

The development of supportive environments and strategic partnerships can also help to minimize the stigma and discrimination faced by many sex workers. UNAIDS Guidance Note at 16. The reduced stigma will, in turn, make sex workers more likely to seek health services and information. Effective programs would also provide sex workers with the education and training necessary to make meaningful, informed decisions about their lives. *Id.* at 17.

The third pillar of UNAIDS's approach focuses on the need to reduce vulnerability of sex workers to HIV infection. Gender inequality, discrimination and social exclusion are among the structural issues that contribute to vulnerability to HIV. UNAIDS Guidance Note at 18. These factors, combined with poverty, mobility and displacement, may also cause individuals to become sex workers, thereby further increasing their vulnerability to HIV. *Id.* Gender inequality, for example, leads many women to become sex workers. *Id.* at 20. Women and girls are often faced "[w]ith unequal access to education, employment, credit or financial support outside marriage." *Id.*

Addressing these structural factors — which necessarily requires a sustained, cooperative engagement with an affected population — is essential to reversing the AIDS epidemic and sustaining long-term progress in the response to HIV. *Id.* at 19.

Several studies and UNAIDS's own experience have shown that reducing the transmission of HIV associated with sex work is feasible and necessary. *Id.* at 7. The three pillars approach recommended by UNAIDS creates a framework for building on past progress, providing guidance "for developing effective strategies to reduce the immediate HIV risk to sex workers, [partners of sex workers,] and their clients, and to the spouses and regular partners of clients; provide care for sex workers living with HIV; and reform official policies, practices and legislation to protect the human rights of sex workers." *Id.* at 24. This approach, however, requires that participating organizations have sufficient programmatic flexibility in order to involve sex workers in the formulation and implementation of the programs designed to reduce the rate of HIV infection within their communities. Organizations working with sex workers should be able to engage with this group in a supportive and non-stigmatizing environment that creates trust and enables partnerships in support of effective programs against HIV.

B. *An Effective Effort to Address HIV Requires Adequate Funding to Programs Designed to Ensure HIV Prevention, Treatment, Care and Support for Sex Workers.*

Global funding for the HIV response has risen significantly in the past 10 years to some US$ 16.6 billion in 2011. UNAIDS, *Investing for Results. Results for People. A People-Centred Investment Tool Towards Ending AIDS*, UNAIDS/PCB(30)12.CRP.4, at 4 (2012) (hereinafter, "*Investing for Results*"). This increase was made possible by the leadership and commitment of governments in all parts of the world, and particularly by the funding provided by the United States Government. Although important, current funding for HIV still falls short of the US$ 22 billion estimated yearly cost for achieving universal access to HIV prevention, treatment, care, and support by 2015. Bernhard Schwartländer *et al.*, *Towards an Improved Investment Approach for an Effective Response to HIV/AIDS*, 377 The Lancet 2031 (2011). "If investments in the AIDS response are not adequate, well targeted and prioritized, not only will future investment needs increase but the effectiveness and return on current investments will diminish." *Investing for Results* at 4.

This concern is particularly acute with respect to programs designed to ensure access to HIV prevention, treatment, care and support for sex workers. These programs remain chronically under-funded, and as a result are often implemented on such a small and localized scale that they do not reach most sex workers. *Prevention and Treatment* at 11. A review of eight country case studies found

that "[t]he coverage of HIV prevention services among sex workers is low, with generally less than 50 percent of sex workers reporting access to basic prevention services." *Global HIV Epidemics*, The World Bank at xxvii.

The experience of several organizations working in Asia highlights the difficulties posed by funding constraints for programs seeking to address HIV among sex workers. For instance, Vesha Anyay Mukti Parishad Plus ("VAMP"), an organization led by sex workers in India, has instituted a peer-based outreach program that provides HIV-related education and counseling to sex workers, and promotes and facilitates HIV testing among them. UNFPA, UNAIDS and Asia-Pacific Network of Sex Workers, *The HIV and Sex Work Collection: Innovative Responses in Asia and the Pacific* at 79, 82, *available at* http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2012/20121212_HIV_SW.pdf. Yet, VAMP faced severe challenges in providing HIV treatment, care and support services due to lack of funding. *Id.* at 79, 84. Financial support for implementing community-led referral services for treatment, care and support programs was virtually non-existent, and post-test follow-up support was often not funded altogether. *Id.* at 84. In another example, the Targeted Outreach Programme ("TOP"), which is the single largest provider of HIV prevention services in Myanmar, has faced continuous funding challenges in an effort to scale up its HIV prevention and treatment program for female sex workers. *Id.* at 37, 46. The lack of funding is a constant concern for the program's sustainability. *Id.* at 46.

These and other organizations provide much-needed services designed to limit the spread of HIV among sex workers. Yet, the programs they offer continue to face an uncertain future due to the lack of sufficient and sustainable funding. In order to give these organizations and others working to address HIV among sex workers the appropriate tools to offer comprehensive HIV prevention, treatment, care and support services to this population, it is important that the avenues of potential funding remain open to them. To reduce the ability of organizations to allocate funds to HIV-related programs that enable the engagement and participation of sex workers would further diminish the already scarce resources available to address HIV among sex workers. Ensuring adequate funding for a comprehensive, evidence-informed, rights-based and community-led response to HIV in the context of sex work is critical to the overall effort to end the HIV epidemic.

CONCLUSION

For these reasons, the UNAIDS Secretariat respectfully requests that this Court consider the aforementioned elements of effective HIV responses among sex workers, informed by public health evidence and human rights, and resolve this case in a manner that supports access to funding and resources for all organizations engaged in HIV prevention, treatment, care and support services with and for sex workers, permitting these organizations to conduct the work that makes the greatest difference in the global response to HIV.

Respectfully submitted,

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APPENDIX:
UNAIDS'S OBJECTIVES, STRUCTURE AND APPROACH

UNAIDS was established in 1994 pursuant to UN Economic and Social Council Resolution 1994/24, which tasks UNAIDS with the following objectives:

- provide global leadership in response to the HIV/AIDS epidemic;
- achieve and promote global consensus on policy and programmatic approaches;
- strengthen the capacity of the UN system to monitor trends and ensure that appropriate and effective policies and strategies are implemented at the country level;
- strengthen the capacity of national governments to develop comprehensive national strategies and implement effective HIV/AIDS activities at the country level;
- promote broad-based political and social mobilization to prevent and respond to HIV/AIDS within countries, ensuring that national responses involve a wide range of sectors and institutions; and
- advocate greater political commitment in responding to the epidemic at the global and country levels, including the mobilization and allocation of adequate resources for HIV/AIDS-related activities.

UNAIDS organizes its work through a Division of Labour which describes how the UNAIDS family (*i.e.*, the UNAIDS Secretariat and the Cosponsors) works collectively to support effective responses to HIV at global, regional, and national levels. Within UNAIDS, the UNAIDS Secretariat has the overall responsibility for ensuring functioning and accountability across all areas of the Division of Labour, as follows:

(a) the UNAIDS Secretariat is to influence the setting of a rights-based and gender-sensitive HIV political agenda for the three Strategic Directions outlined in the UNAIDS Strategy for 2001–2015;

(b) the UNAIDS Secretariat is to promote coordination, coherence and partnerships across the Division of Labour in the Joint Programme; and

(c) the UNAIDS Secretariat is to support the mutual accountability of the Secretariat and Cosponsors to enhance program efficiency and effectiveness and to optimally deliver on the shared Joint Programme mission, vision, and Strategy, with measurable results.

UNAIDS operates within the framework of the UN system. It benefits from, and seeks to support, the commitments of UN Member States. As a UN-system entity, UNAIDS is guided by, *inter alia*, the UN Charter, the Universal Declaration of Human Rights and the UN human rights treaties. UNAIDS is also guided in its work by the Millennium Declaration and Millennium Development Goal 6, by which Member States have committed to halt and reverse the HIV epidemic. Moreover, UNAIDS supports the implementation of the declarations on HIV and AIDS adopted by the three sessions of the

UN General Assembly dedicated to the global AIDS epidemic. In these declarations, UN Member States have made several commitments regarding many different aspects of the response to HIV:

(a) On June 10, 2011, UN Member States adopted a General Assembly resolution titled the *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, U.N. Doc A/RES/65/277 (June 10, 2011), in which they noted that many national HIV-prevention strategies inadequately focus on populations that epidemiological evidence shows to be at higher risk and that these populations include sex workers.

(b) On June 2, 2006, UN Member States adopted a General Assembly resolution titled the *Political Declaration on HIV/AIDS*, U.N. Doc. A/RES/60/262 (June 2, 2006), in which they committed to overcoming legal or other barriers that block access to effective HIV prevention, treatment, care and support.

(c) On June 27, 2001, UN Member States adopted a General Assembly resolution titled the *Declaration of Commitment on HIV/AIDS*, U.N. Doc. A/RES/S-26/2 (June 27, 2001), in which they noted that some factors, including of a legal nature, are hampering awareness, education, prevention, care, treatment and support efforts.

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In the Supreme Court of the United States

Agency for International Development, et al.,

Petitioners,

v.

Alliance for Open Society International, Inc., et al.,

Respondents,

ON THE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CRUIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF RESPONDENT

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U.S. Const. amend. I ..... *passim*

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

SUMMARY OF ARGUMENT

The Policy Requirement of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act"), 22 U.S.C. § 7631(f), extracts a pledge that prohibition on prostitution is good public policy as the price of securing the government's support to combat diseases. The compulsion of such speech is frontally inconsistent with the fundamental protection of the First Amendment that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that it entirely authored this brief and no party, its counsel, or any other entity but *amicus* and their counsel made a monetary contribution to fund the brief's preparation or submission. This *amicus curiae* brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of Court for the Supreme Court of the United States.

force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). While the Spending Clause authorizes Congress to "condition the receipt of funds" on compliance "with restrictions on the use of those funds" as "the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare[,]'" "[c]onditions that do not . . . govern the use of the funds . . . cannot be justified on that basis." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012). The Policy Requirement is not a condition on the proper use of the funds. Indeed, it has no effect on how recipients use the funds because, as Petitioners concede, applicants for funding "are not required to take additional, affirmative measures to certify their compliance with the statutory condition or to publicize their policy to third parties" after the funding is received. *See* Petitioners' Br. at 44.

By the same token, Petitioners' reliance on this Court's decisions upholding disbursements of "public funds to private entities to advance a governmental program or convey a governmental message," Petitioners' Br. at 18, is also misplaced. Given Petitioners' concession that the speech compelled by the Policy Requirement is akin to a whispered sidebar between the government and applicant, the compulsion of such speech cannot be justified as a means of advancing a government program or conveying a government message through a private speaker.

ARGUMENT

I. The Policy Requirement Exceeds Congress's Spending Clause Power

Petitioners are correct that Congress has "broad authority under the Spending Clause to attach conditions to the receipt of federal funds in order to further its policy objectives," Petitioners' Br. at 15, but such conditions must be directed at ensuring the proper use of the funds if they would otherwise be beyond the scope of Congress's enumerated powers. *See Sebelius*, 132 S. Ct. at 2603–04 (holding that the Spending Clause authorizes Congress to "condition the receipt of funds" on compliance "with restrictions on the use of those funds" as "the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare[,]'" but that "[c]onditions that do not . . . govern the use of the funds . . . cannot be justified on that basis").

If the conditions attached to the receipt of federal funds do not pertain to the proper use of the funds, they must be conditions that Congress could permissibly have imposed directly. Accordingly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), this Court upheld the constitutionality of the Solomon Amendment, which required universities receiving federal funds to allow military recruiters access to their institution or else lose the entirety of their federal assistance, only because Congress could have directly required the universities "to provide equal access to military

recruiters without violating the schools' freedoms of speech or association." *Id.* at 70.

The Policy Requirement, however, is not a condition on the proper use of the federal funds by the recipient organizations but merely a pledge for its own sake that does not have any substantive impact on the work of the recipient organizations. The Petitioners concede as much by admitting that "[r]ecipients are not required to take additional, affirmative measures to certify their compliance with the statutory condition or to publicize their policy to third parties." Petitioners' Br. at 44.

Thus, to salvage the Policy Requirement, it would have to be shown that Congress would have been authorized to impose the requirement directly, apart from any funding. Neither the Spending Clause nor any other Article I power, however, authorizes Congress directly to compel persons to confess their faith in the correctness of the government's view that prohibition on prostitution is good public policy. *See Barnette,* 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *Board of Education v. Pico,* 457 U.S. 853, 879 (1982) (per curiam) (Blackmun, J., concurring) (noting that the First Amendment bars "prescriptions of orthodoxy").

Thus, the Policy Requirement cannot be justified as a permissible exercise of Congress's authority under the Spending Clause.

II. The Policy Requirement is Not Supported by This Court's Decisions Upholding Disbursements of Public Funds to Private Entities to Advance a Governmental Program or Convey a Governmental Message

The Petitioners find no support in *Rust v. Sullivan* regarding regulations that prohibited Title X projects from "engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning, and require such projects to maintain an objective integrity and independence from the prohibited abortion activities." 500 U.S. 173, 173 (1991). This Court held that the regulation merely prohibited a "grantee or its employees from engaging in activities outside of the project's scope," *id.* at 194, and that "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized," *id.* at 196. In the present case, by contrast, the condition attached to the receipt of the funds is not a restriction on how funds may be spent.

Likewise, the condition on the receipt of funds at issue in *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003), to wit, that libraries install software to prevent minors from accessing obscene or pornographic material, can be explained as a

condition on the proper use of the funds, namely, that funds should be utilized for libraries that are safe environments for minors. *Id.* at 211-12 ("Congress may certainly insist that these public funds be spent for the purposes for which they were authorized. . . . As the use of filtering software helps to carry out these [funded] programs, it is a permissible condition under *Rust*.") (internal quotation marks omitted).

The same can be said of *South Dakota v. Dole*, 483 U.S. 203 (1987), in which this Court upheld a condition on states receiving their full allocated share of federal highway funds that required states to increase the lawful drinking age to 21 based on Congress's interest in ensuring that the funds would be utilized for safe interstate highways. *Id.* at 208.

CONCLUSION

For these reasons, the *amicus curiae* respectfully urges this Court to affirm the judgment of the Second Circuit Court of Appeals in favor of the Respondents.

Respectfully submitted,

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